Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

WILLIAM M. MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a discovery deposition in a civil case, taken prior to the joint indictment of the declarant and the defendant, is admissible under Rule 804(b)(1), FED.R.EVID., when there has been no showing that the defendant against whom the deposition is offered had notice of the deposition, that he or his civil counsel was present, or that he had a similar motive and opportunity to develop the declarant's testimony by direct, cross, or redirect examination?

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner respectfully presents this petition to review an opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Petitioner was convicted after a jury trial and his conviction was affirmed on direct appeal by the United States Court of Appeals for the Fifth Circuit. *See* **Appendix A**; *United States v. Mann*, ___ F.3d ___ (5th Cir. 1998). Petitioner's timely filed Petition For Rehearing and his Suggestion For Rehearing *En Banc* were both denied on January 12, 1999. *See* **Appendix B.** The issues raised in this petition were adversely decided against Petitioner by the Court of Appeals.[1]

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction pursuant to

[1] The issues tendered to this Court by Mr. Mann in his petition for writ of certiorari were also adversely decided against Mr. Moore and, to the extent that Supreme Court Rule 12 allows, Moore should be allowed to join in those issues in the event that this Court grants Mr. Mann certiorari.

28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Rule 804(a) and (b)(1), Federal Rules of Evidence

Hearsay Exceptions; Declarant Unavailable.

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant –

> **(1)** is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> **(2)** persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT OF THE CASE

The record in this case is extensive. Pursuant to Supreme Court Rule 14(g), Petitioner has endeavored to keep his recitation of the facts brief and related solely to the questions presented in this Petition.

A. PROCEDURAL HISTORY

On August 14, 1992, James Scott Mann (Mann) was indicted in Cause No. A 92 CR 129 for three counts of income tax related offenses. 1 R. 1.

On June 30, 1993, a thirty-nine count superseding indictment was returned naming Mann, William M. Moore (Moore), Julian Alsup, Peter Gallaher, and Charles Christensen in various counts. The indictment alleged two separate conspiracies (one of which allegedly began in 1982 and the other which began in 1985) relating to the activities of various savings and loan associations in Texas, substantive violations of various bank statutes, and various income tax related violations including the three counts against Mann contained in the original indictment. 1 R. 73-125.

Although the case was originally dismissed due to discovery abuse by the government, the Fifth Circuit reinstated the case. *United States v. Mann*, 61 F.3d 326 (5th Cir.) *cert. denied*, 116 S.Ct. 434 (1995). Trial as to Mann, Moore and Christensen began on February 20, 1996, and the jury received the case on April 2, 1996. On April 9, 1996, Moore was convicted on 7 counts and acquitted on 9 counts, Mann was convicted of all but one count in

which he was named, and Christensen was acquitted of all counts.

The Fifth Circuit affirmed the convictions of Mann and Moore. Moore's timely filed Suggestion For Rehearing *En Banc* and Motion For Panel Rehearing were denied on January 12, 1999. *See* **Appendix B.**

B. STATEMENT OF FACTS PERTINENT TO PETITION FOR CERTIORARI

The trial involved four separate transactions or series of transactions, the first three of which related to Moore and his co-defendants and the final which related solely to Mann.

First, with regard to counts 1 and 2, all defendants were charged with conspiring to "scam" $4.2 million out of Jefferson Savings & Loan (thereby misapplying funds and impairing and impeding the FHLBB) in order to acquire a portion of the funds necessary for Gallaher, Moore, Alsup and Christensen (GMAC) to acquire 100% of the stock of Jefferson Savings & Loan (Jefferson). This was allegedly done by a series of complicated transactions whereby Mann purchased certain oil and gas properties for $9.6 million and sold them to Jefferson for $13.8 million. Mann, acting through one of his corporations (Camco), then lent $4.0 million of his $4.2 million profit from the oil and gas sale to Moore and Gallaher's corporation, Parkway South Development Corporation (PSDC), to allow PSDC to pay off liens on real estate being transferred to Jefferson as part of the $5.0 million acquisition price paid to its owners. Although this transaction was essentially completed by January 1983, the government

included as objectives of this conspiracy the related misapplication of the $4.2 million, the corresponding false entries on the books of Jefferson (i.e., booking the oil and gas properties at $13.8 million as opposed to $9.6 million), and further alleged that the defendants agreed to file false tax returns (which returns were allegedly false solely because the PSDC returns reflecting the $4.0 million loan from Camco to PSDC was allegedly a "sham" loan) and otherwise impaired and impeded the IRS.

Counts 3 through 25 alleged that individual defendants (excluding Mann) filed false financial statements with two separate financial institutions, which financial statements were false because they failed to reflect that PSDC lent Gallaher, Moore, Alsup and Christensen substantial sums to acquire Jefferson (i.e., PSDC lent each of them approximately $1.3 million).

Counts 26 to 29 each alleged that the four defendants (other than Mann) had filed false tax returns because the PSDC returns reflecting the $4.0 million loan from Mann/Camco to PSDC contained in the liability section of the balance sheet on Schedule L was allegedly a "sham" loan.

Counts 30, 31 and 32 alleged that all defendants conspired to misapply funds and make a false entry (and substantive counts of misapplication and false entry) related to Camco's sale of a piece of property (Bridgepoint, also known as Hidden Valley or the Pinnacle Boy Scout Property) to Northwest Savings (a successor to Jefferson Savings & Loan) for oil and gas properties originally acquired by Jefferson in 1982 as well as Mann's acquisition of Northwest from GMAC.

Counts 33 to 39 alleged various offenses against Mann only, including false entries by Mann in the books of CreditBanc Savings Association (counts 33 and 36), bank bribery by Mann (count 34), and false tax returns and failure to file income tax returns by Mann (counts 37 to 39).

On two occasions during the government's case-in-chief, the government sought to introduce co-defendant (and co-appellant) Mann's deposition testimony from a September 1991, civil lawsuit styled FDIC vs. Jones Day Reavis & Pogue (hereinafter FDIC v. Jones Day). On the first occasion – the fourth trial day – the government offered the testimony as a co-conspirator statement under Rule 801(d)(2)(E). 32 R. 161-162, 166-168, 173. Moore leveled extensive objections to Mann's prior deposition including that Mann's statements were not in the course of and in furtherance of any alleged conspiracy and that they violated Moore's right to confrontation and that a severance would be necessary. 32 R. 163, 169-170, 176-177. Moore also asked for a limiting instruction. 32 R. 169, L.2-11. When the court indicated concern over whether Mann's deposition was a co-conspirator statement, the government withdrew its offer.

On the next to last day of trial, the government again sought to introduce as a co-conspirator statement under Rule 801(d)(2)(E) Mann's 1991 deposition in FDIC vs. Jones Day. 47 R. 2-17. The government opined that Mann's deposition showed that Moore had knowledge of Mann/Camco's profit of $4.2 million from a purchase and resale of oil and gas properties, and that the source of Mann/Camco's loan of $4.0 million was from that $4.2 million profit.

Moore objected, *inter alia*, because Mann's deposition excerpts were not statements in furtherance of any conspiracy, that the excerpts were not admissible under Rule 804(b)(1) (because Moore did not have an **opportunity** and **similar motive** to develop the testimony by direct, cross, or redirect testimony, 47 R. 4-5, 8), and that admission of Mann's deposition would constitute a denial of confrontation (*Bruton v. United States*, 391 U.S. 123 (1968)). 47 R. 2-17.

The government attempted to deflect the *Bruton* problem, 47 R. 16-17, but the court was emphatic that the "undisputed record in this case will show that I've had more motions for severance than I have had anything else. And the government has consistently indicated that there was no reason for a severance. . . . But *Bruton* has been in this case – or an allegation of *Bruton* has been in this case for some time." 47 R. 16-17.

The court took the matter under advisement and later that day, Moore leveled additional objections to Mann's deposition and moved for a severance and a limiting instruction. 47 R. 141-155. The court overruled Moore's objections, denied his request for a severance and limiting instruction and permitted the government to read Mann's deposition to the jury. The district court ruled that Mann's FDIC v. Jones Day deposition was an admission under Rule 801(d)(2)(A) – **NOT** co-conspirator statements under Rule 801(d)(2)(E) – and was sworn former testimony under Rule 804(b)(1). 47 R. 143-144. Upon a request for clarification, the court reiterated that the 1991 FDIC vs. Jones Day depositions of Mann was being admitted as an admission against Mann under Rule 801(d)(2)(A) and/or as former sworn testimony under

Rule 804(b)(1) as to Moore. 47 R. 147-148. The court denied Moore's request for a limiting instruction, 47 R. 147-148, and the court denied Moore's request for a severance.[2]

On the last day of trial, Mann's FDIC v. Jones Day deposition was read to the jury. 48 R. 255-287. Shortly thereafter, Moore reurged his motion for severance and for a limiting instruction, 48 R. 311, both of which were denied. 48 R. 311. The government then rested its case-in-chief. 48 R. 316. None of the co-defendants presented a defense.

Moore's appeal focused on the second instance when the court overruled Moore's objections to Mann's 1991 FDIC Jones Day deposition – admitting it **NOT** as co-conspirator statement, but rather as an admission and/or as former testimony under Rule 804(b)(1) – denied Moore's motion for severance due to denial of confrontation, *Bruton v. United States, supra,* and antagonistic defenses, and denied a limiting instruction as to Mann's deposition testimony. Moore asserted, *inter alia,* that: (1) the government, as the proponent of the evidence, had failed to demonstrate the proper predicate under Rule 804(b)(1) (Moore had no similar motive nor an opportunity to cross-examine Mann at the discovery deposition); (2) that the admission violated *Bruton* (i.e., Moore's

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[2] Severance was requested because the reading of the testimony would violate *Bruton* and create inconsistent and antagonistic defenses where there had been no notice from the government prior to trial that it would attempt to introduce portions of any depositions. 47 R. 153-154.

Sixth Amendment right to confrontation and cross-examination) and was harmful; and (3) that a severance should have been granted and/or a limiting instruction should have been given.

Moore's appellate brief and reply brief asserted that Mann's FDIC v. Jones Day deposition was not admissible **against Moore** under Rule 804(b)(1) because the government failed to sustain its burden[3] of demonstrating that the evidence was admissible under Rule 804(b)(1). Moore cited *United States v. McDonald*, 837 F.2d 1287, 1290-93 (5th Cir. 1988) (affirming trial court decision to exclude defendant's proffer of deposition from a civil proceeding because government did not have the same motive at the time the deposition was taken to litigate fact pertinent to criminal trial for which the deposition proffer was offered); and *United States v. Atkins*, 618 F.2d 366, 372-73 (5th Cir. 1980) (prior testimony was not admissible because government lacked similar motive to develop testimony of deponent). Moore pointed out that he had objected to Mann's FDIC vs. Jones Day deposition on these very grounds, among others. 47 R. 4-5, 8. Moore also pointed out that despite these objections, the government failed to have the trial record reflect whether Moore was present during Mann's FDIC v. Jones Day deposition and thus had the **opportunity** to cross examine Mann,

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[3] Moore cited Rule 802, Federal Rules of Evidence, and *United States v. Fernandez-Roque*, 703 F.2d 808, 812 (5th Cir. 1983) ("Roque, the proponent of the hearsay evidence, has the burden of proving the unavailability of the witness from the prior trial.").

citing *United States v. Deeb*, 13 F.3d 1532, 1535-36 (11th Cir. 1994), *cert. denied* 513 U.S. 1146 (1995).[4]

In his appellate brief, Moore also asserted that the government was well aware that neither Moore nor his civil counsel, Gary DeShazo, were present at Mann's deposition, an assertion never disputed by the government![5] Moore also noted in his brief that despite his objections, the government also failed to have the trial record reflect whether the **issues were the same** in the FDIC vs. Jones Day lawsuit, thus giving Moore a **similar motive** to develop Mann's testimony by cross-examination. Moore pointed out to the district court that the FDIC vs. Jones Day lawsuit **did not** include as causes of action the topics upon which Mann was questioned, 47 R. 4-5 and that it was merely a discovery deposition. 47 R. 7. The record also reflects that although the FDIC vs. Jones Day lawsuit did include causes of action for breach of fiduciary duties and negligence and that Moore and Mann were both parties, 47 R. 7-8, there would be no **similar motive** for co-defendants in a discovery deposition conducted by the FDIC to cross-examine each other absent some evidence that there was a cross-action between Mann and Moore. *See* Moore's Brief at pages 32-43; Moore's Reply Brief at pages 107-111.

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[4] Earlier in the trial, when the government read some of the FHLBB depositions from 1987, the government did read into the record the names of all persons present and their attorneys. *See e.g.*, 36 R. 150-151, 166-167, and 189. Obviously, the government could have done this as to Mann's FDIC v. Jones Day deposition, but the government, despite Moore's objections, failed to do so.

[5] Moore noted the actual people present at the deposition at footnote 36 of his brief.

In its appellate brief, the government barely addressed these arguments and cited only one case, *United States v. Beaumont*, 972 F.2d 91 (5th Cir. 1992), although it urged harmless error. Government's Brief at 132-134.

At oral argument, the government responded only that the error was harmless (implicitly conceding that the admission was erroneous under Rule 804(b)(1)).

The panel opinion (**Appendix A** at pages 36 to 39) stated the following:

> "*Bruton* issues are reviewed under an abuse of discretion standard. (footnote omitted). A district court abuses its discretion if it bases its decision on an error of law or a clearly erroneous assessment of the evidence. (footnote omitted). We find no abuse of discretion. Assuming that Mann's out-of-court statements directly incriminated Moore without reference to other admissible evidence, thus implicating *Bruton*, "*Bruton* has been limited . . . to cases where the admission of the incriminating statements was not within a firmly rooted exception to the hearsay rule." (footnote omitted) The district court reasoned that Mann's testimony was admissible as an admission of a party under FED. R. EVID. 801(d)(2), or as former testimony under FED. R. EVID. 804(b)(1). We cannot say that the district court erred, legally or factually, in concluding that the testimony was admissible under Rule 804(b)(1). (footnote omitted) This rule provides a hearsay exception where the declarant is unavailable (footnote 56 – Mann was "unavailable" because he invoked his Fifth

Amendment privilege against self-incrimination) and the evidence consists of deposition testimony in another proceeding, provided that "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." As a legal matter, we hold that Rule 804(b)(1) is a firmly rooted exception to the hearsay rule. (footnote omitted) "As for the factual predicate of opportunity and motive to develop the prior testimony, the district court reasoned:

> This is . . . testimony given by . . . Mr. Mann in a lawsuit where they are both represented, wherein the FDIC is attempting to recover its losses against the lawyers that represented. We've referred to it as Jones Day, but Mr. Mann, Mr. Moore, Mr. Gallaher, Mr. Christensen, Mr. Alsup were all parties there represented, and the main thrust of the lawsuit was obviously for the FDIC to obtain money from the conduct involving Jefferson Savings, Jefferson Energy, Northwest, Franklin and City Bank.

The court referred to the testimony as "testimony in a proceeding whereby the issues were generally the same." Moore does not show that this factual premise for admission was clearly erroneous. If Moore was a party to the prior suit, and it involved similar claims, we cannot say that the district court erred in ruling the testimony admissible under Rule 804(b)(1). Moore argues that he was not present at the deposition, but as a party to the suit he certainly had an opportunity to attend. He also argues that the deposition was merely a discovery

> deposition, and that he did not necessarily have a motive to cross-examine Mann at that time. Rule 804(b)(1), however, does not require that the party against whom the prior testimony is offered had a compelling tactical or strategic incentive to subject the testimony to cross-examination, only that an opportunity and similar motive to develop the testimony existed."

On petition for rehearing and suggestion for rehearing *en banc*, Moore pointed out that the panel opinion conflicted with this Court's opinion in *United States v. Salerno*, 505 U.S. 317 (1992) and failed to consider and apply the "similarity of motive" test adopted by the Seventh Circuit in *United States v. Feldman*, 761 F.2d 380, 387 (7th Cir. 1985), which had been adopted by the Fifth Circuit in *United States v. McDonald*, 837 F.2d 1287 (5th Cir. 1988).

Moore also pointed out that Mann had never been called to the stand and asserted his Fifth Amendment privilege and thus was unavailable only by virtue of the government's joint indictment of Moore and Mann and its opposition Moore's motion for severance, contrary to the Fifth Circuit's conclusion in footnote 56 (quoted above).[6]

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[6] Contained within the "Question Presented" is the subsidiary question of whether a declarant is unavailable within the meaning of Rules 804(a) and 804(b)(1), Federal Rules of Evidence, when the government has jointly indicted the declarant and the defendant against whom the deposition is to be offered and then opposed a severance at the time it offers the declarant's former testimony.

Rehearing and rehearing en banc were denied without an additional opinion. *See* **Appendix B.**

SUMMARY OF ARGUMENT

The former testimony exception embodied within Rule 804(b)(1) is a firmly rooted exception to the hearsay rule that satisfies the confrontation clause of the Sixth Amendment. Reliability is presumed because the party against whom the former testimony is offered had an "opportunity" and a "similar motive" to subject the declarant to rigorous cross-examination at the time the declarant gave the former testimony. However, the factors which courts review to ascertain the nature and scope of that "opportunity" and the nature and scope of that "similar motive" have never been addressed by this Court. These are issues with nationwide significance that impact upon civil and criminal proceedings in all federal courts as well as state civil and criminal trials where there is a counterpart to Federal Rule 804(b)(1). Additionally, the courts of appeal are in disagreement regarding the factors that they consider in ascertaining whether there was an "opportunity" and a "similar motive." This Court should grant certiorari to resolve these conflicts and establish a list of factors which the courts of appeal must consider.

REASONS FOR GRANTING THE PETITION

1. THIS COURT SHOULD DELINEATE THE FACTORS WHICH LOWER COURTS MUST CONSIDER IN DETERMINING WHETHER THE "SIMILAR MOTIVE" REQUIREMENT OF RULE 804(b)(1) HAS BEEN MET.

This Court has never delineated the factors which lower courts must consider in determining the "similar motive" requirement of Rule 804(b)(1). This is an important issue with nationwide significance, applicable to every federal court and to those states which have adopted state evidentiary rules patterned upon the Federal Rules of Evidence.

This Court has previously held that Rule 804(b)(1) requires a "similar motive." *United States v. Salerno*, 505 U.S. 317 (1992).[7] However, this Court has not yet

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[7] In *Salerno*, two witnesses (DeMatteis and Bruno) testified before the federal grand jury under a grant of immunity to matters which were exculpatory to the defendants. At trial, the defendants attempted to introduce the grand jury transcripts of DeMatteis and Bruno under Rule 804(b)(1). The district court excluded the grand jury transcripts, reasoning that the "motive of a prosecutor in questioning a witness before the grand jury in the investigatory stages of a case is far different from the motive of a prosecutor in conducting the trial." Defendants were convicted and appealed.

On appeal, the Second Circuit reversed. 937 F.2d 797 (2nd Cir. 1991). Certiorari was granted and this Court addressed the "similar motive" requirement of Rule 804(b)(1). Concluding that it could find "no way to interpret the text of Rule 804(b)(1) to mean that defendants sometimes do not have to show 'similar motive' ", *id.* at 505 U.S. 321-22, and noting that the Second Circuit had "declined to consider fully the arguments now

addressed the factors which lower courts must consider in determining whether the opponent of the former testimony had a "similar motive." Rule 804(b)(1) appears to be a "firmly rooted" exception to the hearsay rule that satisfies the mandate of the confrontation clause. *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Ohio v. Roberts*, 448 U.S. 56 (1980). As such, former testimony admissible under Rule 804(b)(1) is presumed to have an indicia of reliability. However, that indicia of reliability is guaranteed, at least in part, by the "similar motive" requirement of Rule 804(b)(1). Absent a delineation of factors for all courts to apply to ascertain whether there was in fact a "similar motive", the reliability of former testimony is not guaranteed and thus compliance with the confrontation clause is not ensured. This Court should address and delineate the factors which all courts should employ to ascertain whether there was a "similar motive."

Indeed, a review of the opinions of courts of appeals throughout the country reflect a disturbing lack of consistency in the factors which the courts consider to evaluate whether there was a "similar motive." *See e.g.*, 5 J. McLAUGHLIN, WEINSTEIN'S FEDERAL EVIDENCE § 804.04[5], pp. 804-36 *et seq.* (2d ed. 1999); Annotation, What Constitutes Similar Motive For Purposes Of Rule 804(b)(1) Of Federal Rules Of Evidence, 138 A.L.R. Fed. 367 (1997). Some courts have focused upon whether the party against whom the testimony is to be introduced had the same or similar *incentive* at the earlier proceeding to

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presented by the parties about whether the United States had such a [similar] motive", this Court remanded the case "for further consideration." *Id.*, at 325.

develop the testimony as it has at the time the former testimony is to be introduced. *See e.g., United States v. DiNapoli*, 8 F.3d 909 (2nd Cir. 1993); *United States v. Taplin*, 954 F.2d 1256 (6th Cir. 1992). The Tenth Circuit has focused on whether the party against whom the former testimony was offered had itself examined the witness. *See United States v. Harenberg*, 732 F.2d 1507 (10th Cir.1984); *United States v. Kapnison*, 743 F.2d 1450 (10th Cir.1984). The Seventh Circuit has applied a "similarity of motive" test to determine admissibility. *See United States v. Feldman*, 761 F.2d 380, 387 (7th Cir. 1985).[8]

Due to the lack of a consistent approach throughout the circuits, this Court should grant certiorari and delineate the factors which all courts must consider to determine the "similar motive" requirement of Rule 804(b)(1).

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[8] In *Feldman*, the government's charge of wire fraud relied heavily on the deposition of defendants' former business associate taken in an earlier proceeding. The Seventh Circuit held that the civil deposition was inadmissible under Rule 804(b)(1) because "no one at the [civil] deposition had the requisite stake in the proceeding that would be necessary for them to be deemed a predecessor in interest to the criminal defendants. . . . " *Id.* The Court listed several factors to be considered in determining whether the motive to develop the testimony in the civil proceeding was sufficiently similar to the motive that the party now would have in the criminal proceeding: "(1) the type of proceeding in which the testimony is given, (2) trial strategy, (3) the potential penalties or financial stakes, and (4) the number of issues and parties.' " *Feldman*, 761 F.2d at 385 (quoting *Zenith Corp. v. Matsushita Electric Industrial Co.*, 505 F. Supp. 1190, 1252 (E.D.Pa.1980), *aff'd in part, rev'd in part*, 723 F.2d 319 (3d Cir.1983)).

2. THE FIFTH CIRCUIT'S TREATMENT OF THE "SIMILAR MOTIVE" REQUIREMENT OF RULE 804(b)(1) CONFLICTS WITH PRIOR CASES FROM THE FIFTH CIRCUIT.

As noted above, the Fifth Circuit held in the present case that:

> The court referred to the testimony as "testimony in a proceeding whereby the issues were generally the same." Moore does not show that this factual premise for admission was clearly erroneous. If Moore was a party to the prior suit, and it involved similar claims, we cannot say that the district court erred in ruling the testimony admissible under Rule 804(b)(1). Moore argues that he was not present at the deposition, but as a party to the suit he certainly had an opportunity to attend. He also argues that the deposition was merely a discovery deposition, and that he did not necessarily have a motive to cross-examine Mann at that time. Rule 804(b)(1), however, does not require that the party against whom the prior testimony is offered had a compelling tactical or strategic incentive to subject the testimony to cross-examination, only that an opportunity and similar motive to develop the testimony existed."

The Fifth Circuit's disposition was entirely inconsistent with its prior pronouncements. For instance, in *United States v. McDonald, supra,* McDonald claimed that the court erred in excluding from evidence the deposition of Minteer taken during the civil proceeding and testimony of William Erwin, one of the ANICO auditors. Erwin's testimony would have been that he was present during the Minteer deposition, that Minteer had testified that the

nine checks from McDonald to Minteer were payments on a boat slip that McDonald had contracted to buy from Minteer in 1980, and that Minteer had identified a deed and accounting of the McDonald payments related to the boat slip. McDonald contended that this evidence of Minteer's former testimony was admissible under 804(b)(1), but the district court excluded it.

On appeal, the parties disagreed over the applicability of the predecessor in interest provision of Rule 804(b)(1). The government contended that the predecessor in interest provision of Rule 804(b)(1) applied only when a deposition taken in a civil action is sought to be introduced in a subsequent civil action. McDonald, however, argued that the phrase "in a civil action" refers to the type of proceeding in which the deposition was taken rather than the type of proceeding in which the deposition is offered. He argued that ANICO was a predecessor in interest to the government because ANICO and the government had the same incentive to develop Minteer's testimony, they both wanted to prove that Minteer defrauded ANICO. The Fifth Circuit agreed with McDonald that Rule 804(b)(1) is not per se inapplicable to criminal cases. The Fifth Circuit then reviewed cases from the Seventh and Tenth Circuits[9] as well as scholarly writings to determine the admissibility in a criminal trial of a deposition taken in a civil case.

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[9] The Fifth Circuit reviewed *United States v. Harenberg, supra, United States v. Kapnison, supra,* and *United States v. Feldman, supra.*

The Fifth Circuit stated in *McDonald* that "we recognize that *Feldman* departs from the view that the predecessor in interest clause is inapplicable when the former testimony is offered against the criminal defendant and we express no opinion on that issue. Rather, we borrow the *Feldman* inquiries for the situation before us – admissibility of former testimony against the government." *McDonald* at 1292. The Court also stated: "If a party in a civil case and the government in a later criminal case have sufficiently similar incentives to develop the testimony, we see no reason to conclude that the rule is necessarily and always unavailable to a criminal defendant." *Id.* at 1292-93. However, the Court held that the former testimony was **not** admissible against the government because:

> Here, although ANICO and the government had similar status in their respective claims, **we find that the trial strategies were not sufficiently similar to admit the Minteer deposition. Minteer's deposition was taken before either McDonald or Minteer had been indicted**, thus ANICO, knowing that it would have the opportunity to cross-examine Minteer at trial did not have the same incentives to then develop inaccuracies in the deposition testimony. . . . (emphasis added)

Id. at 1293.

The Fifth Circuit's reliance upon different trial strategies in *McDonald* is contrary to the Fifth Circuit's treatment in the present case that Rule 804(b)(1) does not require that the party against whom the prior testimony is offered had a compelling tactical or strategic inventive to subject the testimony to cross-examination.

Similarly, despite the Fifth Circuit's apparent adoption in *McDonald* of the four factors enumerated in *Feldman*, the Fifth Circuit departed from utilizing the *Feldman* factors in the present case.

Additionally, the present case is in conflict with *United States v. Young Brothers, Inc., Contractors*, 728 F.2d 682 (5th Cir. 1984). There, the defendants attempted to introduce the prior federal grand jury testimony of Keith Keller and James Kemp, employees of the Allen Keller Company. In grand jury testimony, these two men denied ever talking to Brannon about rigging the bid. Appellant attempted to call Keller and Kemp as witnesses and each indicated that if called to testify he would invoke his privilege against self-incrimination. Appellant asserted at trial that both Keller and Kemp were "unavailable" witnesses under Rule 804(a)(1) and that the court therefore should have permitted the introduction of their grand jury testimony under the "former testimony" hearsay exception of Rule 804(b)(1). The court excluded the grand jury testimony, holding that a witness who claims the privilege against self-incrimination does not become "unavailable" so that former testimony becomes admissible under Rule 804(b)(1). On appeal, the Fifth Circuit noted that Kemp and Keller were unavailable as witnesses within the meaning of Rule 804(a)(1). *Id.* at 681. The Court then stated the following regarding the "difficult question whether the Rule 804(b)(1) definition of 'former testimony' includes grand jury testimony":

> The typical situation encompassed by Rule 804(b)(1) is testimony which was elicited in a **former adversarial hearing**. The importance of the former hearing being adversarial in nature is

> to insure that the party against whom the former testimony is offered at trial had an opportunity to confront the witnesses at the former hearing. (footnote omitted, emphasis added)

Id. at 681.

In the present case, Mann's deposition was not given in an adversarial proceeding: it was a discovery deposition. Although Mann and Moore were both defendants in the FDIC v. Jones Day lawsuit, the deposition was prior to the return of the indictment in the instant case. There was no showing that Moore or his civil counsel had received notice of the deposition or that the issues in the lawsuit included anything remotely related to the issues contained in the indictment. The instant opinion thus conflicts with *Young Brothers, Inc., Contractors.*

Finally, in *United States v. Atkins*, 618 F.2d 366 (5th Cir. 1980), the Fifth Circuit employed an entirely different set of criteria. In *Atkins*, a jury deadlocked on the issue of Atkins' guilt, but convicted Inglet, who was sentenced to 43 years. Inglet agreed to testify for the government at Atkins' retrial in return for a reduction in sentence to ten years. However, due to threats against his family, Inglet refused to testify at Atkins' retrial. After Atkins refused to testify, Atkins attempted to introduce Inglet's testimony from a pretrial James hearing under the former testimony exception of Rule 804(b)(1). Atkins sought to use Inglet's testimony that his source of cocaine in Miami was a man named Robert, whose last name Inglet did not know, in order to establish that Inglet was dealing with someone other than Robert Atkins, whose name was known to Inglet. The Fifth Circuit noted that Atkins' attorney did not participate in the James hearing and that

the James hearing only related to some of Atkins' codefendants. *Id.* at 373. The Fifth Circuit also noted that the government did not contend that Atkins was the Miami supplier being discussed by Inglet in the James hearing, but rather that he was a contact man. The Fifth Circuit concluded "the government did not have the motivation to question Inglet in order to make him acknowledge that the Robert of whom he spoke in the James hearing was in fact Atkins. Accordingly, Inglet's former testimony did not meet the requirements of 804(b)(1) for admission. . . . " *Id.*

Atkins thus conflicts with the instant opinion since the government certainly had more of a similar motive and opportunity in *Atkins* to cross-examine Inglet at the James hearing than Moore would have had to cross-examine Mann at the discovery deposition in a civil suit prior to his indictment in this case. This conflict is without recourse to whether Moore actually had an opportunity to cross-examine, since the record does not even reveal whether he knew about the deposition (and it is clear that he did not attend it).

Because of the disparate and inconsistent treatment of the "similar motive" requirement of Rule 804(b)(1) within the Fifth Circuit, this Court should grant certiorari.

3. THE FIFTH CIRCUIT'S TREATMENT OF THE "SIMILAR MOTIVE" REQUIREMENT OF RULE 804(b)(1) CONFLICTS WITH CASES FROM OTHER CIRCUITS.

As reflected above in Reason For Review 1 and 2, there is no consistency between the circuit courts of

appeal. The Fifth Circuit, being internally inconsistent, also conflicts with opinions of other circuits. Because of the conflicts between the manner of approach by the Fifth Circuit and other courts of appeal, certiorari should be granted to determine this important question.

4. THIS COURT SHOULD DECIDE IF A SIMILAR MOTIVE CAN EXIST WHERE A CIVIL DEPOSITION IS TAKEN PRIOR TO THE RETURN OF A CRIMINAL INDICTMENT.

Regardless of which factors should be employed to analyze the "similar motive", this Court should address whether a "similar motive" can exist when the civil deposition precedes the return of the criminal indictment. Criminal litigation is often preceded by civil litigation. Sometimes, that civil litigation gives rise to ultimate criminal charges that are not even under investigation at the time of the civil litigation. The indicia of reliability inherent in every "firmly rooted" exception to the hearsay rule, and, correspondingly, compliance with the confrontation clause, should not be allowed to erode merely to serve the government's economic desire to try all co-defendants at the same time. This Court should grant certiorari to determine whether a "similar motive" can exist where a civil deposition is taken prior to the return of a criminal indictment at which that civil deposition is offered as former testimony under Rule 804(b)(1). This is an important question with nationwide significance.

5. THIS COURT SHOULD DELINEATE THE FACTORS WHICH LOWER COURTS MUST CONSIDER IN DETERMINING WHETHER THE "OPPORTUNITY" REQUIREMENT OF RULE 804(b)(1) HAS BEEN MET.

This Court has never addressed let alone delineated the factors which lower courts must consider in determining the "opportunity" requirement of Rule 804(b)(1). This is an important issue with nationwide significance, applicable to every federal court and to those states which had adopted state evidentiary rules patterned upon the Federal Rules of Evidence.

Indeed, a review of the opinions of courts of appeals throughout the country reflect a disturbing lack of consistency in the factors which the courts consider to evaluate whether there was an "opportunity" within the meaning of Rule 804(b)(1). *See e.g.*, 5 J. McLAUGHLIN, WEINSTEIN'S FEDERAL EVIDENCE § 804.04[3], pp. 804-31 *et seq.* (2d ed. 1999); Annotation, Admissibility Of Depositions Under Federal Evidence Rule 804(b)(1), 84 A.L.R. Fed. 668 (1997). For instance, in *United States v. Taplin*, *supra*, the Sixth Circuit held that:

> "the opportunity to develop testimony offered at another proceeding is not established by presence alone. The mere fact that Taplin's attorney was in the courtroom during Bailey's suppression testimony and was asked by the presiding judge if he had any questions, is not proof that Taplin was prepared for a full and thorough cross-examination of the witness. The kind of proceeding at which testimony is offered conditions the quality of opportunity to develop the testimony."

In contrast, the Fifth Circuit held in *United States v. Young Brothers, Inc., Contractors, supra,* that the opportunity must be in a former adversarial hearing, whereas in the present case, the prior "opportunity" was a mere civil discovery deposition taken prior to the return of the indictment in this case without any showing of actual notice to Moore.

As one commentator has put it:

> If the party against whom the previous statement is now offered is the party against whom that testimony was given, it is usually compatible with fair practice to make that party bear the consequences of any deficiencies in the cross-examination or of the decision not to cross-examine.
>
> In some cases, however, because of particular circumstances, the opportunity to cross-examine at the earlier proceeding may not have resulted in a test of the reliability of the statement. The conduct of the cross-examination or the decision not to cross-examine may not have been "Meaningful in light of the circumstances prevailing when the former testimony was given." In other words, although an "opportunity" for cross-examination is usually sufficient, "the opportunity must be full, substantial and meaningful in view of the realities of the situation."

5 J. MCLAUGHLIN, WEINSTEIN'S FEDERAL EVIDENCE § 804.04[3][b], pp. 804-32.1-32.2 (2d ed. 1999) (footnotes omitted).

Because of the lack of standards regarding what constitutes an "opportunity" within the meaning of Rule 804(b)(1), this Court should grant certiorari and clarify

the meaning of "opportunity" employed by Rule 804(b)(1).

6. THE FIFTH CIRCUIT'S TREATMENT OF THE "OPPORTUNITY" REQUIREMENT OF RULE 804(b)(1) CONFLICTS WITH A PRIOR CASE FROM THE FIFTH CIRCUIT.

As noted above, the Fifth Circuit held that "[i]f Moore was a party to the prior suit, and it involved similar claims, we cannot say that the district court erred in ruling the testimony admissible under Rule 804(b)(1). Moore argues that he was not present at the deposition, but as a party to the suit he certainly had an opportunity to attend."

The Fifth Circuit's conclusion in this case conflicts with its prior pronouncement in *United States v. McDonald, supra,* where the Fifth Circuit required an **adversarial hearing** before there was an "opportunity" within the meaning of Rule 804(b)(1). Because of the internal inconsistency within the Fifth Circuit, certiorari should be granted.

7. THE FIFTH CIRCUIT'S TREATMENT OF THE "OPPORTUNITY" REQUIREMENT OF RULE 804(b)(1) CONFLICTS WITH CASES FROM OTHER CIRCUITS.

As reflected above in Reason For Review 5 and 6, there is no consistency between the circuit courts of appeal and the Fifth Circuit, being internally inconsistent, also conflicts with approach taken by other circuits. Because of the conflicts between the manner of approach

by the Fifth Circuit and other courts of appeal, certiorari should be granted to determine this important question.

8. THE FIFTH CIRCUIT'S TREATMENT OF THE "OPPORTUNITY" REQUIREMENT OF RULE 804(b)(1) UNDERMINES THE RELIABILITY INHERENT IN A FIRMLY ROOTED EXCEPTION TO THE HEARSAY RULE.

The Fifth Circuit's opinion creates a mandatory (if not irrebuttable) presumption that any party to a civil lawsuit necessarily has the opportunity to attend any and all depositions that will be taken in that civil lawsuit. This presumption is applied by the Fifth Circuit even where the record reflects an absence of actual notice to the parties to the civil case. The essence of due process is notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Since it is well established that it is the proponent's burden to prove the predicate for the admission of evidence, *United States v. Salerno, supra*, the Fifth Circuit's mandatory presumption eliminates the evidentiary burden properly placed upon the proponent of the evidence and renders suspect the presumption of reliability with which "former testimony" is cloaked as a "firmly rooted" exception to the hearsay rule.

Moreover, none of the other circuits which have addressed the "opportunity" requirement have allowed a mere naked opportunity to suffice. Indeed, in *United States v. Taplin, supra*, the Sixth Circuit stated:

> In order for a suppression hearing to provide the opportunity for testimonial development

> required by the rule, we think it essential that the hearing involve the defendant qua defendant. *United States v. Rundle*, 417 F.2d 305 (3rd Cir. 1969), *cert. denied*, 397 U.S. 1050, 25 L.Ed.2d 665, 90 S.Ct. 1388 (1970). If the motion for which the testimony is elicited does not require the defendant's presence, then the fortuity of his appearance is not the equivalent of a full opportunity to develop testimony. Opportunity under 804(b)(1) means more than naked opportunity. *United States v. Franklin*, 235 F.Supp. 338, 341 (D.C. 1964).

As stated by Wigmore, "the opportunity must have been an adequate one." 5 J. WIGMORE, EVIDENCE § 1386, p. 90 (J. Chadbourn rev. 1974). Although adequacy may be a relative term, this Court should grant certiorari to determine the minimal threshold standards for this question of nationwide significance.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50609

UNITED STATES OF AMERICA,

Plaintiff-Appellee-
Cross Appellant,

versus

JAMES SCOTT MANN; WILLIAM M. MOORE,

Defendants-Appellants-
Cross Appellees.

Appeals from the United States District Court
for the Western District of Texas

(Filed Nov. 23, 1998)

Before REAVLEY, DAVIS and DUHÉ, Circuit Judges.

REAVLEY, Circuit Judge:

Appellants James Mann and William Moore were convicted on numerous counts relating to their dealings with Jefferson Savings and Loan Association, McAllen, Texas (Jefferson), and its successor institutions. They challenge the sufficiency of the evidence and raise numerous other grounds for reversal. The government cross-appeals on a sentencing issue. We affirm.

A. *Sufficiency of the Evidence*

When reviewing the sufficiency of the evidence to support a conviction, we view the evidence, including all reasonable inferences drawn therefrom and all credibility determinations, in the light most favorable to the verdict.[1] The verdict will be upheld if a rational jury could have found the essential elements of the offense beyond a reasonable doubt.[2] With these standards in mind, we do not attempt a comprehensive recitation of the evidence, much of which was conflicting. We endeavor here only to explain, after a careful review of the evidence, our conclusions regarding the sufficiency points of error.

1. *Count 1 and Related Counts*

Mann and Moore challenge the sufficiency of the evidence on count 1 and related counts of the superseding indictment on which they were tried. These counts concern Jefferson's purchase of oil and gas properties known as the Tartan properties in late 1982. Count 1 charged Peter Gallaher, Moore, Julian Alsup, Charles Christensen (GMAC),[3] and Mann with conspiracy in violation of 18 U.S.C. § 371. Generally, "to establish guilt

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[1] *United States v. Resio-Trejo*, 45 F.3d 907, 910-11 (5th Cir. 1995).

[2] *United States v. Walters*, 87 F.3d 663, 667 (5th Cir.), *cert. denied*, 117 S. Ct. 498 (1996).

[3] Alsup died before trial. Gallaher was severed from the case because his lawyer was injured shortly before trial, and later pleaded guilty to a single count. Christensen went to trial with Mann and Moore and was acquitted on all counts against him.

for conspiracy, the government must prove beyond a reasonable doubt that two or more people agreed to pursue an unlawful objective together, that the defendant voluntarily agreed to join the conspiracy, and that one of the members of the conspiracy performed an overt act to further the conspiracy."[4] By its terms, § 371 provides that the unlawful objective of the conspiracy may be "to commit any offense against the United States," i.e. to commit a federal crime, or "to defraud the United States."

In order to convict a defendant of conspiracy, the prosecution must offer substantial evidence that the defendant was a member of the conspiracy.[5] However, each element of a conspiracy may be inferred from circumstantial evidence.[6] An agreement may be inferred from a "concert of action."[7] A conspiracy may exist by tacit agreement; an express or explicit agreement is not required.[8]

Count 1 charged that GMAC and Mann conspired:

(a) to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Federal Home Loan Bank Board (FHLBB) in the regulation,

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[4] *United States v. Faulkner*, 17 F.3d 745, 768 (5th Cir. 1994).

[5] *United States v. Malatesta*, 590 F.2d 1379, 1381-82 (5th Cir. 1979) (en banc).

[6] *United States v. Cardenas*, 9 F.3d 1139, 1157 (5th Cir. 1993).

[7] *Id.* (quoting *United States v. Espinoza-Seanez*, 862 F.2d 526, 537 (5th Cir. 1988) (internal quotation marks omitted)).

[8] *United States v. Westbrook*, 119 F.3d 1176, 1189 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1059-60 (1998).

supervision, and examination of the affairs of Jefferson;

(b) to willfully misapply monies, funds, assets, and credits of Jefferson in violation of 18 U.S.C. § 657;

(c) to make false entries in the records, reports, and statements of Jefferson, in violation of 18 U.S.C. § 1006;

(d) to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service in the ascertainment, computation, assessment, and collection of revenue, namely, income taxes; and

(e) to make and file with the Internal Revenue Service false income tax returns in violation of 26 U.S.C. § 7206(1).

Regarding the underlying substantive federal offenses referenced, establishing an offense under 18 U.S.C. § 657 requires proof that the accused was an officer, agent or employee of, or connected in some way with, a federally insured savings and loan association, he willfully misapplied funds of the association, and he acted with intent to injure or defraud the association.[9] To establish a false entry in violation of 18 U.S.C. § 1006, the government must prove that the accused was an officer, agent, or employee of a lending institution authorized by and acting under the laws of the United States, that he knowingly and willfully made, or caused to be made, a false entry concerning a material fact in a book, report, or

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[9] *Faulkner*, 17 F.3d at 771.

statement of the institution, and that he acted with the intent to injure or defraud the institution or any of its officers, auditors, examiners, or agents.[10] A violation of 26 U.S.C. § 7206(1) is established by proof that the accused willfully made and subscribed to a tax return, the return contained a written declaration that it was made under penalties of perjury, and the accused did not believe that the return was true as to every material matter.[11]

A rational jury could have found the following based on the evidence presented. Jefferson was a financially troubled institution, owned by Guillermo Cartaya. Mann and GMAC were interested in acquiring Jefferson. Mann and GMAC had become acquaintances through various business dealings. Mann dropped out of the acquisition group, in part because of concern that his prior bankruptcy might concern regulators. GMAC, principally through Moore, and Mann hatched a byzantine scheme to acquire Jefferson by stealing $4 million of the institution's own assets. This fraud was effected when Mann purchased the Tartan properties for $9.6 million, and simultaneously sold the properties to Jefferson for $13.8 million, thus clearing a $4.2 million profit. Mann ultimately kept part of the profit, and transferred part of the profit to GMAC, who then used the funds to buy Jefferson.

Mann located the Tartan properties, which were for sale. In dealing with the sellers, Mann purported to be

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[10] *United States v. Parks*, 68 F.3d 860, 865 (5th Cir. 1995).

[11] *United States v. McCord*, 33 F.3d 1434, 1450 (5th Cir. 1994).

acting as an agent or "trustee" for Jefferson, even though GMAC had not yet acquired Jefferson. Mann used a company he had incorporated a few months earlier, Camco Financial Corporation (Camco), in the course of negotiations to buy the Tartan properties. Mann negotiated a $9.6 million purchase price with Forbes Gordon, acting on behalf of the owners of the properties. Mann testified in a civil deposition that he dealt exclusively with Moore in negotiating to sell the properties to Jefferson, and that Moore knew what Mann was paying for the properties. In December of 1982, Moore and Fred White, who wanted to remain as president of Jefferson, caused Jefferson to wire $13.8 million in cash from Jefferson to Mann's Camco "trustee account." Of these funds, $9.6 million went to the sellers of the Tartan properties. The properties were assigned to Jefferson. In monthly and quarterly filings with the FHLBB, Jefferson reported assets based on the $13.8 million price it had paid for the Tartan properties, rather than the $9.6 million price Mann had paid.

Of the $4.2 million profit Mann made on the purchase and simultaneous sale of the Tartan properties, Mann proceeded to funnel $4 million to GMAC, who ultimately used the funds to acquire Jefferson. The transactions that followed in the space of a few days could not have been less straightforward. Hitting the high points, Mann kept $200,000 of the profit. Camco paid off $4 million in debt on a shopping center owned by Parkway Square Joint Venture, in which Moore and Gallaher had an interest. The shopping center was transferred to Parkway South Development Corporation (PSDC), a company controlled

by Moore and Gallaher. PSDC issued a $4 million promissory note to Camco (the PSDC note). Jefferson paid PSDC approximately $6 million in cash and three parcels of land for the shopping center. PSDC transferred approximately $5 million in cash to GMAC, and GMAC executed a note to PSDC. The GMAC partners also individually signed $900,000 notes payable to PSDC. GMAC paid Cartaya, the owner of Jefferson, $5 million in cash for his stock in Jefferson. Cartaya transferred $1.5 million in cash to PSDC and received three parcels of land. Mann later sold the $4 million PSDC note to Alsup and Christensen for approximately $1 million in cash, property and a note. Payments were not made on the PSDC note. For years after GMAC acquired Jefferson, PSDC filed tax returns identifying a $4 million "loan from stockholders," rather than revealing $4 million in income to GMAC that was used to acquire Jefferson.

Two former members of the Jefferson board testified that the old board had not approved the acquisition of the oil and gas properties, and that a board resolution purporting to state otherwise was false. A rational jury could find that Moore or another conspirator fabricated the board resolution approving the transaction before GMAC acquired Jefferson.

A rational jury could find that the price Jefferson paid for the Tartan properties was grossly inflated. First, the very nature of the transactions support such a finding. Mann and Gordon, on behalf of the sellers, reached an arms-length price that was $4.2 less than the price Jefferson paid. The incentive on the part of those who controlled Jefferson to cause Jefferson to overpay is manifest: GMAC were thereby able to use Jefferson's own

federally insured deposits to acquire Jefferson; Mann personally profited by over $1 million; and Cartaya was able to unload his troubled institution and walk away with approximately $5 million in cash and real estate. The rank self-dealing, by itself, is compelling evidence that Jefferson paid too much. The complex nature of the transactions and appellants' efforts to conceal them from federal regulators (discussed further below) casts further doubt on the legitimacy of the price Jefferson paid.

Other evidence, though conflicting, supports a finding that Jefferson paid far too much for the Tartan properties. Gordon testified that sophisticated parties almost always look to evaluation studies when buying oil and gas properties such as the Tartan properties. Mann and Gordon reviewed such a study prepared by Ron Lenser, and referred to that study in their purchase agreement. While the evaluation gives a discounted net future income figure of $13.5 million for the properties, Gordon was adamant at trial that this figure is not consistent with the fair market value of such properties. He testified that, in part because of the risk associated with such properties, as opposed to a safer investment, the $13.5 million figure "does not say they are worth 13.5 million dollars. . . . [T]here's no way that anybody is going to pay you 13 million dollars, in my opinion for oil property, I don't think." Asked what he would say if such a price had been proposed, Gordon responded "I wouldn't pay any attention to you. I would tell you to take a walk." Lenser testified that the future net income figure was not the same as fair market value and that he so stated in his report. He calculated the fair market value of the properties at $9.2 million. Another expert at evaluating oil and

gas properties testified that the net future income figure in the Lenser report does not correspond to fair market value, due to risk factors, and that the figures in the Lenser report indicate a fair market value of about $8.5 million for the Tartan properties. Jefferson tried to sell the properties in 1983. No formal offers were made, and the highest prices that potential purchasers "kicked around" were $3 to $3.5 million.

David Thornberry, an attorney, testified that his firm was approached by Mann, Moore, Christensen and Gallaher in September of 1982. They represented to Thornberry that they were in the process of acquiring Jefferson. At the outset Thornberry thought he was representing both Moore and Mann. Thornberry met with Moore and Mann regarding the Tartan properties. Thornberry's notes indicate that "we've agreed to purchase [the Tartan properties], probably a ten million-dollar transaction." Thornberry drafted legal documents pertaining to the sale of the Tartan properties. He understood that "nine-point-something million dollars was the . . . final negotiated price." Mann never explained to Thornberry that he was "going to have Camco resell the oil and gas properties over to Jefferson Savings for 13.8 million dollars," or hand over $4 million of excess funds Jefferson paid for the oil and gas to GMAC to buy the institution.

GMAC and Mann did not reveal the true nature of the transactions to regulators. Attorney Ben Plotkin[12] and

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[12] Plotkin later was hired by Moore as an officer at First Federal Financial, the GMAC holding company that owned Jefferson and two other thrifts. Plotkin also became a director of Northwest Savings Association, the successor of Jefferson.

his firm prepared the notice of change in control for Jefferson that was required by the FHLBB. The notice, signed by each of the GMAC partners, required answers to pre-printed questions. The notice was prepared based on information provided by GMAC. Plotkin spoke with Moore several times. Moore never told Plotkin that the oil and gas transaction was part of the financing for the acquisition of Jefferson. The notice asked the source of funds for the acquisition and whether "any part of such funds is to be borrowed or otherwise obtained for the purpose of making the acquisition." GMAC did not indicate that any of the funds had come from Jefferson itself or from Camco, or that GMAC and PSDC had signed the related promissory notes described above. David Cockcroft, the FHLBB official who reviewed the notice, testified that it did not disclose that the acquirers intended to cause Jefferson to pay $13.8 million cash for the Tartan properties, and that $4 million of this amount would be used to acquire Jefferson. In Cockcroft's opinion, the failure to disclose these transactions meant that GMAC had not acquired the institution under the terms and conditions stated in the notice. If these transactions had been disclosed, "we would have looked with suspicion or with great concern about any significant assets going out of the institution," which had a net worth of only $4 million at the time.

The FHLBB conducted an examination of Jefferson in 1983 that lasted several months. The assigned agents met with Moore and White, and focused on the oil and gas properties, among other things. They requested documentation underlying the investment. Jefferson provided them a copy of the purchase agreement between Camco

and Jefferson whereby Jefferson paid Camco $13.8 million for the properties. They were not told or provided documentation that Mann had paid only $9.6 million for the properties. One of the agents testified that if they had been told that the acquisition of GMAC depended on the purchase of the oil and gas properties, "[i]t would have been a big red flag as far as the examiners were concerned."

In 1985, in the course of an IRS examination of GMAC, Jefferson, and other entities, Gallaher told the agent performing the examination that the funds for the acquisition of Jefferson had come from InterFirst Bank, Alsup and Christensen, rather than from Jefferson itself. Moore told the agent that the acquisition funds came from loans from PSDC. In 1988, after agent Burns concluded that each of the GMAC individuals "had received one million dollars of income from Jefferson Savings and Loan through the Camco entity for the purchase of the stock of Jefferson," the IRS sent deficiency notices to GMAC. GMAC responded with a tax suit claiming that "these dollars were loans," rather than taxable income. In March 1987 depositions before the FHLBB, Gallaher denied knowing where Mann got the money for the $4 million PSDC loan, and denied knowledge of who had sold the Tartan properties to Jefferson. Christensen denied knowing the identity of the seller of the Tartan properties. Moore denied knowing that Mann was the seller of the properties.

In summary, a rational jury could find that Mann and Moore participated in a conspiracy whereby: (1) Mann sold the Tartan properties to Jefferson at an inflated price; (2) Mann, for personal financial gain, and GMAC used

the profits from the sale of the Tartan properties to transfer ownership of Jefferson to GMAC, in effect misapplying Jefferson's own assets to acquire Jefferson, at a time when the institution was already in poor financial shape; and (3) the conspirators concealed the true nature of the acquisition scheme from federal banking authorities; (4) overstated the assets of the institution to perpetuate GMAC's control of it; and (5) filed false returns with the IRS to conceal the nature of their transactions and avoid taxes. The evidence is sufficient on count 1.

The evidence was also sufficient on count 2, which charged that GMAC, aided and abetted by Mann,[13] made a false entry on the books of Northwest Savings Association (Northwest) by overstating the value of Jefferson Energy Corporation, which held the Tartan properties, in violation of 18 U.S.C. § 1006. Jefferson changed its name to Franklin Savings Association-McAllen, and was merged into Northwest in December 1983. Northwest remained under the control of GMAC. The evidence showed that Jefferson continued to carry the value of Tartan properties at an inflated priced derived from the original purchase price to Jefferson.

Mann and Moore argue that the acquisition of the Tartan properties was a "value for value" transaction that

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[13] A defendant is guilty of aiding and abetting a criminal offense when he associates with the criminal activity, participates in it, and acts to help it succeed. *United States v. Pedroza*, 78 F.3d 179, 183 (5th Cir. 1996). "Typically, the same evidence will support both a conspiracy and an aiding and abetting conviction." *United States v. Singh*, 922 F.2d 1169, 1173 (5th Cir. 1991).

cannot be considered criminal, under the reasoning of *United States v. Beuttenmuller*.[14] In *Beuttenmuller*, Shamrock Savings wanted to sell unproductive real estate known as the Tanglewood property. Defendant Gill and his partner Billings wanted additional financing for a real estate development known as the Mansfield property. Through a complex transaction, (1) a subsidiary of Shamrock purchased an interest in the Mansfield property, (2) a newly created entity controlled by Gill and Billings bought the Tanglewood property from Shamrock, (3) proceeds from the sale of the Mansfield property interest were used to make the down payment on the Tanglewood property, (4) the remaining balance due on the sale of the Tanglewood property was financed through a nonrecourse loan from Shamrock, and (5) Shamrock recorded a profit on its books as a result of the sale of the Tanglewood property.[15]

We reversed the convictions of the Shamrock president, Gill and Beuttenmuller, an attorney who documented the transactions, on all bank fraud counts, including a conspiracy count alleging a conspiracy to make false entries and misapply funds. We found nothing illegal per se when a savings association sells its own real estate and loans money for the purchase price, or when a borrower uses the proceeds from a separate sale of property to the lender as the down payment. We held that the transactions amounted to a "cash for trash" transaction in

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[14] 29 F.3d 973 (5th Cir. 1994).

[15] *Id.* at 975-77.

violation of the bank fraud statutes, rather than a legitimate "value-for-value" transaction, only "(1) if the Mansfield property had *no* value; or (2) if the value of the Mansfield property was so low that the transaction was essentially a sham designed to cover the fact that Shamrock Savings was gratuitously providing Gill and Billings with the down payment money for the purchase of [the Tanglewood property]."[16] Because the government could not prove either condition, we reversed the convictions. We concluded that "no criminality can be attached to [defendants] because the bottom dropped out of the real estate markets."[17]

We believe that *Beuttenmuller* is factually so different from the pending case that it cannot control the result here. The nature of the alleged fraud in *Beuttenmuller* was that the defendants employed a "cash for trash" scheme to avoid regulations requiring a down payment for real estate. "A 'cash for trash' scheme is an illegal scheme that allows an institution to sell [real estate owned] that has been wholly financed in violation of banking regulations that require at least a twenty percent down payment."[18] In the pending case the government proved a far more sinister conspiracy. The conspiracy was not merely one to avoid regulations requiring a down payment. The rankest form of self-dealing was demonstrated. As explained above, the government proved that Mann purchased the properties for $9.6 million, and in concert with Moore, caused Jefferson simultaneously to pay $13.8 million for

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[16] *Id.* at 979-80.

[17] *Id.* at 983.

[18] *Id.* at 979.

the property. On the difference in price, Mann pocketed $200,000 up front, and was later rewarded with another $1 million when he sold the PSDC note. The remainder of Mann's initial profit was funneled to Moore and others in an elaborate scheme that allowed them to take over Jefferson. In effect, appellants stole millions of dollars from Jefferson to enrich themselves and take over Jefferson. This is a more egregious form of fraud, in our view, than simply trying to skirt regulations requiring a down payment on real estate loans. On these facts, we do not read *Beuttenmuller* to hold that appellants escape liability as long as the oil and gas properties had some value. Further, this is not a case where defendants are being judged with hindsight because "the bottom dropped out of the real estate markets."[19] The essence of the fraud here was that Mann negotiated an arms-length price, and then simultaneously sold at a much higher price to personally profit and provide funds for the purchase of Jefferson by GMAC. This case is more akin to "land flip" cases where a single property is bought and sold simultaneously, and the difference in price is diverted to illicit purposes.[20] In such cases, criminality is not avoided merely by showing that the property that was "flipped" had some value.

Moore argues that the evidence was insufficient on counts 26 and 27. These counts charged that Moore filed 1987 and 1988 corporate tax returns for PSDC, falsely

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[19] *Id.* at 983.

[20] *See, e.g, United States v. Aubin*, 87 F.3d 141, 144 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 965 (1997); *Faulkner*, 17 F.3d at 751-753.

claiming a $4 million "loan from stockholders," in violation of 18 U.S.C. § 7206. The returns also had corresponding or related line items for "loans to stockholders." The government's theory was that the PSDC loan was a sham because it was never intended to be repaid, and that the tax returns were an effort to characterize funds traceable to Mann's sale of the Tartan properties as a loan, rather than income to GMAC, allowing GMAC to avoid personal income taxes. It offered evidence, described above, that the "loan" funds originated with Mann's sale of the Tartan properties to Jefferson, which were used to pay off the shopping center which was then bought by Jefferson. The proceeds of the sale of the shopping center to Jefferson were then used by GMAC to buy Jefferson, consistent with the government's theory that GMAC used Jefferson's own money to acquire it. Moore's own accountant was confused by the supposed loans and was concerned that there was no documentation to support them. The PSDC loan was not repaid. In filings with the FHLBB, Mann did not include the PSDC note as an asset on Camco's financial statements. A rational jury could find that the loan was a sham, and that the entries on the tax returns were part of an effort to allow GMAC to avoid declaring millions of dollars in income. More specifically, the jury could find that instead of having PSDC report millions of dollars in dividends to GMAC, or payments to GMAC via 1099 forms, the conspirators treated the $4 million transfer from Camco as a loan in the PSDC tax returns. We find the evidence sufficient on counts 26 and 27.

2. *Count 30 and Related Counts*

Mann and Moore challenge the sufficiency of the evidence on count 30. This count alleged a conspiracy whereby GMAC and Mann caused Northwest, the successor institution of Jefferson, to swap the stock in the subsidiary holding the Tartan properties for a piece of real estate owned by Mann. The property swap was part of an alleged conspiracy to "willfully misapply money, funds, assets, and credits of Northwest Savings," and "to fraudulently make and cause false entries in the records, statements, and reports of Northwest Savings." The alleged objectives of the conspiracy were "to fraudulently maintain the inflated net worth of Northwest Savings Association and to prevent regulatory intervention by the Federal Home Loan Bank Board," and "to transfer ownership and control of Northwest Savings to Defendant Mann by fraudulent means."

A rational jury could find the following. In 1984, Northwest still owned the Tartan properties and was still controlled by GMAC. Northwest was a financially troubled institution. In October 1984, the FHLBB informed Northwest that it was insolvent and that the directors should make efforts to infuse capital or otherwise increase the institution's net worth. GMAC responded with a letter to the FHLBB, informing it that it intended to increase its net worth by swapping its oil and gas properties for a tract of land known as Bridgepoint. The letter states that the real estate to be acquired "would have an appraised value equal to or greater than the present book value of" the oil and gas investment. Bridgepoint was part of a larger tract Mann had purchased through Camco from Pinnacle/Affiliated Joint

Venture (Pinnacle). For business reasons unrelated to this case, Pinnacle had released its vendor's lien on the rest of the tract, leaving Bridgepoint saddled with $7.1 million in debt. Mann, by way of a guaranty, was personally liable for $1 million of this debt.

Mann told Dick Matz, who had helped Mann with financing on the Bridgepoint property, that he was purchasing Northwest and that the swap was part of the consideration. In December 1984, Northwest, through GMAC, swapped the Tartan properties (through a transfer of stock in Northwest's energy subsidiary) for Bridgepoint. Northwest assumed Mann's personal guaranty and Camco's $7.1 million debt on the Bridgepoint property. Northwest paid $1.1 million in principal and interest due to Pinnacle on December 30.

A rational jury could find that while the Tartan properties were worth millions of dollars, Bridgepoint had a negative net worth, due to the $7.1 million debt on the property. In late 1983, Patrick McClusky, an MAI appraiser, had appraised Bridgepoint at $3.2 million if it was sold separately. Eve Williams, another MAI appraiser, worked for First Franklin Appraisal Company, a subsidiary of Franklin Savings, which was controlled by GMAC. In early 1985 she appraised the property at $4.5 million. These appraisals did not consider debt on the property. Williams' boss asked her to [sic] "to keep looking at the lot values and the absorption to make sure that [she] had taken into consideration how good, how nice this piece of property was." Frustrated and confused, she asked her boss, "you know, what's the magic number?" Her boss, "who didn't look like he was real serious about it," said the magic number was $19 million. Williams

testified there wasn't any way she could come up with that evaluation.

In 1986, the FHLBB conducted an examination that included an investigation of the Bridgepoint swap. One examiner was concerned that the swap "didn't make any sense," and another, Steven Taylor, "couldn't understand the economic justification for Northwest's part of the deal." An appraisal for the Bridgepoint property could not be located in the institution's records. Written inquiries were sent to Northwest's directors and Mann. A response from GMAC claimed that they had reviewed a December 9, 1983 appraisal, and that they had placed a value of $4 million on the oil and gas properties. The appraisal, however, placed a $3.2 million market value on Bridgepoint. GMAC conceded that Bridgepoint was encumbered with $7.1 million in debt and that Northwest had had to pay $781,000 in accrued interest. Based on these figures, Taylor concluded that Northwest had swapped a property worth $4 million for a property with a negative worth of approximately $5 million, resulting in a loss to the institution of approximately $9 million.

An accountant and acting controller of Northwest, on instructions from Moore or Plotkin, booked Bridgepoint on Northwest's books at $18.8 million. This figure was the sum of the overstated value of the Tartan properties and the outstanding debt on Bridgepoint Northwest had assumed. Northwest had not had an appraisal done on the property prior to the swap. In 1985 FHLBB reports, Northwest reported that Bridgepoint was worth $19.18 million in March, and $19.354 million in April. The accountant testified that when she showed Moore the Eve Williams appraisal, he "threw it across the room." Audie

Pete, a CPA with Ernst and Whinney, became Northwest's controller in May 1985. He was concerned about accounting for the Bridgepoint property because it was such a large part of Northwest's total assets. He asked for an appraisal on more than one occasion. Eventually he ordered an appraisal. Marcella Pardo, another MAI appraiser with First Franklin Appraisal Company, appraised the market value of the property, as of December 31, 1984, at $4.8 million.

In 1985 Mann acquired Northwest Savings from GMAC. He merged it with Equitable Savings and created CreditBanc Savings and Loan Association (CreditBanc). At first he had proposed using Northwest's own money to buy out his partner in Equitable. After this proposal was rejected, the FHLBB reluctantly accepted a later proposal, in part because the FHLBB was of the view that "Northwest is insolvent and we have no other option currently available." At the time federal takeovers of insolvent institutions were limited to those institutions that were "desperately insolvent," according to the official who reviewed the proposed merger. The merger application included a pro forma balance sheet for Northwest, Equitable and the proposed merged institution. The line item for Northwest's real estate owned reflected a value of $18-19 million for the Bridgepoint property.

Prior to the merger Audie Pete believed that "mark to market" accounting would be required, appraising assets as of the date of the merger. He received an oral preliminary appraisal of $5-6 million for the Bridgepoint property. He adjusted the value of Bridgepoint on Northwest's books downward by $14.8 million, an adjustment he believed "would have a very significant impact on the

operations." Mann instructed Pete to cancel the appraisal. Pete then "whited-out" the $14.8 million adjustment.

In summary, a rational jury could find that GMAC and Mann swapped the Tartan properties for the Bridgepoint property in an effort to falsely inflate the reported assets of Northwest. This effort forestalled the FHLBB from declaring Northwest insolvent, allowed Mann to personally unload a property with a negative net worth for valuable oil and gas properties, and allowed for the planned transfer of Northwest to Mann. The swap also removed the oil and gas properties from the books of Jefferson, and the jury could reasonably find this swap as a further effort to delay or hinder regulatory investigation of the earlier transaction made the basis of count 1. We find the evidence sufficient on count 30.

The evidence was also sufficient to convict Moore and Mann on related counts 31 and 32. Count 31 charged that GMAC and Mann with the substantive count of misapplying Northwest's funds in connection with the land swap. A rational jury could find that Moore, as a director of Northwest, grossly misapplied the institution's funds in connection with the swap, and that Mann aided and abetted this misapplication. Count 32 alleged that GMAC, aided and abetted by Mann, made a false entry by booking the Bridgepoint property at almost $19 million. As explained above, a rational jury could conclude that this value was grossly overstated.

Appellants again argue that, under *Beuttenmuller*, the Bridgepoint swap cannot be criminal because it was a value-for-value transaction. Under *Beuttenmuller*, the property swap is considered value-for-value unless the

property acquired had no value, or had "a value so low that the transaction was essentially a sham to cover the fact that" the institution was providing "the down payment money for the purchase of" the institution's real estate.[21] Again, we think the conspiracy here went far beyond a mere subterfuge to avoid regulations requiring a down payment. Further, even under the *Beuttenmuller* test, the jury could easily find that the Bridgepoint property was burdened with so much debt that it had a negative net worth.

3. *Other Counts against Mann*

Mann challenges the sufficiency of the evidence on counts 34, 35, 36, 37, and 39. After Mann traded Bridgepoint to Northwest in exchange for the Tartan properties, he placed the latter into Trilex Energy Corporation (Trilex). Mann was chairman and sole shareholder of Trilex. Pete advised Mann that for tax reasons he needed to sell the oil and gas properties in the fiscal year ending November 1985. Mann learned that Chapman Energy Company (Chapman) was interested in buying oil and gas properties. Mann pressed Chapman to buy the properties by the end of November. The properties were sold to Chapman for $3.5 million. According to Chapman's chairman, to secure the deal, Mann promised (1) to repurchase the properties if there was a discrepancy in the quality or quantity of the properties (since Chapman had not had time to complete its due diligence), (2) to purchase one million shares of Chapman stock from

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[21] *Beuttenmuller*, 29 F.3d at 980.

Roger Chapman, and (3) to provide Chapman with a $20 million line of credit from CreditBanc. The Chapman chairman described the line of credit as "important to us as part of the whole deal," and "an integral part of" the deal.

Mann was convicted on count 34, alleging that he violated 18 U.S.C. § 215(a) by representing to Chapman that CreditBanc would provide $20 million in financing to Chapman and purchase Chapman stock to entice Chapman to buy Mann's oil and gas properties. Mann argues that at most there were some separate discussions about the line of credit and stock purchase unrelated to the Trilex sale, and that in any event the discussions went nowhere. However, a bank officer of a federally insured institution violates § 215 if he "endeavored to procure or procured" a loan from the institution for another in exchange for something of value from that other.[22] We conclude that the evidence is sufficient on this count.

In March 1986, Mann sold one of his companies, T-L Drilling, to Mirlex Corporation for a $2.5 million note payable to the parent of T-L Drilling, Trilex, in which Mann was sole shareholder, and Mirlex's assumption of $1 million of T-L Drilling debt. The note was later distributed to Mann as a dividend. Mann was convicted on counts 35 and 36, alleging that Mann violated 18 U.S.C. § 215(a) and 18 U.S.C. § 1006, by securing the sale of T-L Drilling and the note in exchange for causing CreditBanc to make a $250,000 loan to Jack Curtsinger, one of Mirlex's principals, and representing that CreditBanc would

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[22] *United States v. Jumper*, 838 F.2d 755, 757 (5th Cir. 1988).

fund real estate acquisition loans to Curtsinger. The evidence established that CreditBanc made a $250,000 loan to Curtsinger on the same day that Trilex received the $2.5 million note from Mirlex. Curtsinger testified that the loan was working capital needed to "keep the doors open" at T-L Drilling, and that the loan was made "in relation to" the purchase of T-L Drilling. He testified that Mann told him CreditBanc would consider financing Mirlex's real estate investments, but no such investments were ever financed by CreditBanc. We find the evidence sufficient on count 35, since a rational jury could conclude that Mann both procured and endeavored to procure loans from CreditBanc to Curtsinger in exchange for Mirlex's purchase of T-L Drilling. This same evidence also supports Mann's conviction on count 36, alleging a violation of 18 U.S.C. § 1006.[23]

Mann was convicted on count 37, alleging that he violated by 18 U.S.C. § 7206 by claiming a fraudulently large loss on the 1985 corporate tax return of Trilex. A loss of $4.2 million was the claimed loss on Trilex's sale of the oil and gas properties to Chapman. This loss offset Trilex's substantial taxable gains realized from the Bridgepoint swap. The government offered evidence that the sale to Chapman did not close until after the end of tax year 1985, and that Mann fraudulently moved this

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[23] "In order to convict a defendant of improper participation in bank transactions under section 1006, the government must demonstrate: (1) the defendant's connection with the protected institution; (2) direct or indirect receipt of some benefit from a bank transaction; and (3) intent to defraud." *United States v. Pettigrew*, 77 F.3d 1500, 1522 (5th Cir. 1996) (internal quotation marks omitted).

loss to the prior tax year to avoid taxes. We find the evidence sufficient on this count.

Mann was convicted on count 39, alleging that he understated his income on his 1986 income tax return, in violation of 26 U.S.C. § 7206. Mann had borrowed millions of dollars from Trilex. The government claims that Trilex was liquidated, in which case the amount due on the loan as well as all assets distributed to Mann count as income to him. Mann does not dispute this theory legally,[24] but claims that Trilex Corporation was not liquidated but was merged into another company. The government offered evidence that Trilex was in fact liquidated, including a written liquidation plan, adopted by the company and calling for the complete liquidation of the company and distribution of all assets to the sole shareholder, Mann, and evidence that the Mirlex note held by Trilex had been dividended to Mann. In January of 1987 the Texas Secretary of State declared the corporate charter of Trilex forfeited, after receiving notification from the state Comptroller that Trilex had failed to file a franchise tax report. The government further argues that even if Trilex

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[24] To us, it makes sense that when a lender simply ceases to exist, and there is no evidence that a liquidator, trustee or other successor in interest intends to seek payment on the loan, the loan becomes forgiven in its entirety. A discharge of indebtedness is a form of taxable income. 26 U.S.C. § 61(12). Mann's tax preparer, Christine Spencer, a CPA, testified that if Trilex went out of business, the loan became taxable income to Mann because "[h]e's not going to owe anyone. . . . [H]e received the benefit of the funds and did not pay taxes, nor did the corporation pay tax on it." Audie Pete also wrote a memo opining that the planned liquidation of Trilex would result in a taxable gain to Mann of approximately $10 million.

was not liquidated, Mann still committed tax fraud because Mann caused Trilex to dividend to him the $2.5 million Mirlex note, discussed above, and he did not report that dividend as taxable income.[25] Under either theory we find the evidence sufficient on this count.

B. *Limitations*

Mann and Moore argue that the count 1 conspiracy count was barred by limitations, and that allowing evidence on this time-barred count prejudiced the jury's consideration of the other counts. The limitations period runs from the last overt act of the conspiracy alleged in the indictment and proved at trial.[26]

As explained above, count 1 alleged a conspiracy (1) to defraud the United States by impairing the functions of the FHLBB, (2) to violate 18 U.S.C. § 657 (misapplication of bank funds); (3) to violate 18 U.S.C. § 1006 (false entry in bank records); (4) to defraud the United States by impeding the lawful governmental functions of the Internal Revenue Service; and (5) to file false income tax returns in violation of 26 U.S.C. § 7206.

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[25] Spencer testified that the transfer of the Mirlex note from Trilex to Mann would only increase the amount of the loan from Trilex to Mann, but we think a jury could conclude otherwise. The government produced an assignment of promissory note filed in the courthouse records, stating that Trilex distributed the note to Mann "as a dividend paid from Trilex to Mann." We can locate no documentation supporting Spencer's view that the assignment was treated as an increase in the loan.

[26] *Grunewald v. United States*, 353 U.S. 391, 396 (1957).

Three different limitations periods apply to count 1. The general criminal limitations statute of five years applies to the first object.[27] The fourth and fifth objects, alleging a conspiracy to commit tax fraud and to defraud the IRS, are subject to a six-year limitations period.[28] Conspiracies to violate §§ 657 or 1006 are governed by a ten-year limitations period, 18 U.S.C. § 3293, but this statute applies to offenses occurring prior to its passage only if the previous limitations period (5 years) had not run on the date of enactment of the statute, August 9, 1989.[29] The indictment issued on June 30, 1993. So to fall within the applicable limitations periods, the last act in furtherance of a conspiracy to impede the FHLBB had to occur after June 30, 1988, the last act in furtherance of a conspiracy to impede the IRS or violate the tax laws had to occur after June 30, 1987, and the last act in furtherance of a conspiracy to violate §§ 657 and 1006 had to occur after August 9, 1984.

Moore argues that if any one of the alleged objectives of the conspiracy is barred by limitations, the conviction on count 1 must be reversed. We cannot agree. If any one of the five alleged violations was proven, then the government proved a violation of § 371. "The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict

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[27] 18 U.S.C. § 3282.

[28] 26 U.S.C. § 6531.

[29] Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 961(*l*)(3), 1989 U.S.C.C.A.N. (103 Stat.) 183, 501 (1989), *reprinted in* 18 U.S.C.A. § 3293 (West Supp. 1998) (Historical and Statutory Notes).

stands if the evidence is sufficient with respect to any one of the acts charged."[30] Moore relies on *Yates v. United States*.[31] In *Yates*, the defendant was convicted on a conspiracy count alleging two objectives. The Court held that one of the objectives was barred by limitations, and that the conviction therefore required reversal, since "it is impossible to tell which ground the jury selected."[32]

However, in *Griffin v. United States*[33] the Court restricted the holding of *Yates* to cases where one of the alleged objects of the conspiracy is *legally* defective. "Legal error" is not insufficiency of evidence, but "means a mistake about the law, as opposed to a mistake concerning the weight or factual import of the evidence."[34] In cases where the evidence of one of the alleged objectives of the conspiracy is factually insufficient, the Court in *Griffin* held that the verdict should stand so long as there is sufficient evidence on another alleged object of the conspiracy.[35] Moore does not demonstrate that one of the alleged objects of the conspiracy was "legally defective," in the *Griffin* sense; he argues only that there was insufficient evidence of acts committed within the limitations period as to some of the alleged objects of the conspiracy.

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[30] *Turner v. United States*, 396 U.S. 398, 420 (1970).

[31] 354 U.S. 298 (1957).

[32] *Id.* at 312.

[33] 502 U.S. 46 (1991).

[34] *Id.* at 59.

[35] *Id.* at 56-60. *Accord United States v. Wilson*, 116 F.3d 1066, 1080 (5th Cir. 1997) (discussing *Yates* and *Griffin*), *cert. denied*, 118 S. Ct. 703-04 (1998).

Moore alternatively argues that the government failed to prove any act in furtherance of any objective of the conspiracy within the applicable limitations period. We agree with the government that there was sufficient evidence of numerous overt acts in furtherance of the alleged conspiracy occurring within the limitations periods. There was evidence that in 1987, 1988, 1989 and 1990, Moore caused the filing of corporate tax returns for PSDC, showing a $4 million "loan" from stockholders. A rational jury could find that this loan, discussed further above, was a sham, and that the tax filings allowed the GMAC partners to avoid taxes and conceal the fact that Mann and GMAC had used Jefferson's own funds to acquire Jefferson.[36] A rational jury could find that these filings were acts in furtherance of concealing the first,

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[36] Mann argues that the jury could not have found the 1989 and 1990 tax filings to be in furtherance of the conspiracy, because the jury acquitted Moore on counts 28 and 29, the substantive counts for filing a false tax return. The verdict is not necessarily inconsistent in this regard. The jury might have found that the later filings were not "material" since they simply restated past filings. While materiality is an element for tax fraud, see 26 U.S.C. § 7206(1), there is no requirement that an act in furtherance of a conspiracy must be "material." More likely, the jury simply decided that convicting Moore on two counts relating to the PSDC tax return (counts 26 and 27) was sufficient, and that additional convictions would amount to overkill. Even if the verdict is inconsistent, the conviction on count 1 should stand, as long as the evidence is sufficient to support a conviction on that count. *United States v. Powell*, 469 U.S. 57, 67-69 (1984). Given "the Government's inability to invoke review, the general reluctance to inquire into the workings of the jury, and the possible exercise of lenity . . . the best course to take is simply to insulate jury verdicts from review on this ground." *Id.* at 68-69.

fourth and fifth objects of the conspiracy.[37] As to the third object of the conspiracy – the making of false records and reports of Jefferson – there was evidence that Northwest continued to overstate the value of the Tartan properties to the FHLBB until the time of the swap of these properties for the Bridgepoint Residential property in late 1984.

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[37] Moore argues that the tax filings could not have furthered the first object of the conspiracy – impeding the lawful governmental functions of the FHLBB in the regulation, supervision, and examination of the affairs of Jefferson Savings – because there was no evidence that the FHLBB and the IRS shared information. However, in the course of the 1985 IRS examination of GMAC and their companies, agent Burns requested "documents that the GMAC group filed with any regulatory agency regarding the acquisition of Jefferson Savings and Loan," and received some documents. A dispute with the IRS over the treatment of the "loan" became a matter of public record when the GMAC partners filed a tax court action in 1988. A rational jury could find that Moore and Mann, from the outset, recognized that the means employed to acquire Jefferson required concealment from and misrepresentations to the IRS as well as the FHLBB. Moore also argues that all efforts to impede the IRS ended in April 1987, when Mann disclosed key aspects of the acquisition of Jefferson to IRS agent Burns. According to Burns, Mann disclosed that he had received a $1 million fee as agent or broker for the sale of the Tartan properties to Jefferson, that via the $4 million loan from Camco to PSDC, "the funds had been loaned or transferred to [GMAC]," and that the PSDC note had been repurchased by Alsup and Christensen at a discount. This testimony does not establish that all efforts by the conspirators ceased after these disclosures. First, Mann continued to characterize the $4 million transfer to GMAC as a "loan." Second, the jury could find that later efforts by the conspirators, including the filing of the PSDC tax returns, and the prosecution of the tax court action, were efforts to impede the IRS.

A rational jury could find that these filings were in furtherance of the conspiracy to make false statements. Moore argues that filings with the FHLBB in 1984 could not have related to Jefferson, since Jefferson did not even exist at the time. However, Jefferson's successor entity, Northwest, continued to operate after Jefferson was merged into Northwest. Examination of the affairs of Jefferson by the FHLBB, including examinations that might, and did, lead to the pursuit of criminal sanctions, did not end with the merger.[38]

Relying on *Grunewald v. United States*,[39] Mann and Moore argue that the overt acts on which the government relied were at most acts to conceal an already completed conspiracy, and that such acts are not acts in furtherance of the conspiracy for limitations purposes. The conspiracy count in *Grunewald* concerned efforts by the defendants to obtain "no prosecution" rulings in two tax cases by bribing an IRS official. The Court reversed the conspiracy conviction on limitations grounds, reasoning that "after the central criminal purposes of a conspiracy have

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[38] Regarding the second object of the alleged conspiracy – misapplication of Jefferson's funds – the government conceded to the jury and the district judge that limitations had run on the original misapplication of Jefferson's funds in the purchase of the Tartan properties. However, it argues on appeal that later "misapplications occurred when the conspirators, on a month by month basis, caused and approved the payment of interest necessary to carry the oil and gas properties in Jefferson's asset portfolio at the inflated $13 million-plus value." It made a similar argument to the district court. Without deciding the merit of this argument, we hold that limitations had not run on the other objects of the conspiracy.

[39] 353 U.S. 391 (1957).

been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment."[40] The Court's concern was that holding otherwise "would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators."[41] Appellants argue that under *Grunewald* all of the alleged acts in furtherance of the conspiracy within the limitations periods were no more than efforts to conceal the alleged central purpose of the conspiracy – the 1982-83 purchase of the oil and gas properties and takeover of Jefferson by GMAC.

We cannot agree with appellants that the count 1 conspiracy convictions must be reversed under *Grunewald*. As quoted above, the Court held that the limitations period runs where, after the "central criminal purposes of a conspiracy have been attained," the only acts occurring within the limitations period are acts of concealment from which a "subsidiary conspiracy to conceal may not be implied." *Grunewald* recognized, however, that "a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained."[42] It

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[40] *Id.* at 401-02.

[41] *Id.* at 402.

[42] *Id.* at 405.

recognized that in some cases "the successful accomplishment of the crime necessitates concealment."[43] Later cases have recognized that acts of concealment are in furtherance of the conspiracy for limitations purposes where the nature of the conspiracy is such that concealment is part of or in furtherance of the main objectives of the conspiracy. We have recognized that acts of concealment are "part of the central conspiracy itself" where "the purpose of the main conspiracy . . . by its very nature, called for concealment."[44] "[C]oncealment is sometimes a necessary part of a conspiracy, so that statements made solely to aid the concealment are in fact made during and in furtherance of the charged conspiracy."[45] In *Forman v. United States*,[46] the Court held that an indictment alleged and the evidence supported a conspiracy to evade taxes extending from 1942 to 1953, even though the last fraudulent return was for 1945, because concealment had to continue if the evasion was to succeed.[47]

In the pending case, the count 1 conspiracy was not limited to a conspiracy to misapply the assets of Jefferson, and obtain control of Jefferson through that fraudulent transaction. The central aim of the conspiracy extended to concealing the fraudulent nature of the transaction, in order to evade taxes and maintain control of the institution in the face of continual regulatory oversight. Frustration of investigatory efforts by the FHLBB and the

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[43] *Id.*

[44] *United States v. Diez*, 515 F.2d 892, 897-98 (5th Cir. 1975).

[45] *United States v. Del Valle*, 587 F.2d 699, 704 (5th Cir. 1979).

[46] 361 U.S. 416 (1960).

[47] *Id.* at 423-24.

IRS in a highly regulated environment was central to the conspiracy. The evidence supported a conspiracy, as alleged in the indictment, not only to defraud Jefferson and obtain control of the institution, but "to hide and keep concealed from the [FHLBB] the true facts and circumstances surrounding the acquisition, financing, operation, and management of Jefferson Savings;" "to hinder and defeat the [IRS] in the ascertainment, assessment, collection, and payment of income tax on the $4.2 million fraudulently obtained from Jefferson Savings;" and "to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the [FHLBB] in the regulation, supervision, and examination of the affairs of Jefferson Savings."

Mann argues that, irrespective of evidence of overt acts in furtherance of the conspiracy committed by others, *his* participation in the conspiracy ended no later than September 1983, when he sold the PSDC note to Alsup and Christensen and received, in the government's words, his $1 million "payoff" for his efforts to transfer control and ownership of Jefferson to GMAC. We cannot agree that Mann's role in the conspiracy ended on this date. Ordinarily, a defendant is presumed to continue his involvement in a conspiracy unless he makes a substantial affirmative showing of " 'withdrawal, abandonment, or defeat of the conspiratorial purpose.' . . . Indeed, '[a] member of a conspiracy continues to be responsible for acts committed by coconspirators even after the former's arrest unless he has withdrawn from the conspiracy.' "[48]

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[48] *United States v. Puig-Infante*, 19 F.3d 929, 945 (5th Cir. 1994) (quoting *United States v. Branch*, 850 F.2d 1080, 1082 (5th

To demonstrate withdrawal from the conspiracy, the defendant must show that he has committed affirmative acts inconsistent with the object of the conspiracy that are communicated in a manner reasonably calculated to reach conspirators.[49] Mann does not meet this burden.

C. *Bruton Claims*

Mann complains that under *Bruton v. United States*,[50] the court reversibly erred when it failed to sever Mann from the trial after allowing the government to introduce prior testimony of Moore that conflicted with prior testimony of Mann that was also read to the jury. This claim is based on testimony given by Mann and Moore to the FHLBB. Mann testified that he dealt exclusively with Moore in connection with the Jefferson's acquisition of the Tartan properties. Moore, on the other hand, was asked whether he was "aware of a purchase by Mr. Mann's companies from a company called Tartan Exploration of the oil and gas properties which were then later sold to Jefferson." Moore testified that "I have seen that name subsequent to our acquisition of Jefferson. I was not familiar with that prior to that point in time." In other testimony read to the jury, Moore denied knowing that Mann had purchased the properties for less than he was selling them to Jefferson.

Cir. 1988) and *United States v. Killian*, 639 F.2d 206, 209 (5th Cir. 1981)).

[49] *Id.*

[50] 391 U.S. 123 (1968).

Mann does not show a *Bruton* violation. *Bruton* is inapplicable unless the codefendant's out-of-court statement "directly incriminates the non-confessing defendant without reference to other, admissible evidence."[51] Moore's statement that he was not familiar with a purchase of the Tartan properties by Mann prior to Jefferson's purchase of the properties did not directly incriminate Mann. That testimony tends to exculpate both of them from the charge that they conspired to have Jefferson purchase the Tartan properties from Mann at an inflated price, and to use the profits to allow GMAC to acquire Jefferson.

Moore complains that *Bruton* was violated when the court allowed the government to introduce deposition testimony of Mann. In particular, Moore complains of excerpts of a deposition Mann gave in a civil suit brought by the FDIC against a law firm, Mann and GMAC. In that deposition, Mann testified that (1) he purchased the Tartan properties for $4 million less than he sold them to Jefferson, (2) he negotiated the price Jefferson paid with Moore, and (3) Moore was aware of the price Mann had paid for the properties.

Bruton issues are reviewed under an abuse of discretion standard.[52] A district court abuses its discretion if it bases its decision on an error of law or a clearly

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[51] *United States v. Espinoza-Seanez*, 862 F.2d 526, 534 (5th Cir. 1988).

[52] *United States v. Beaumont*, 972 F.2d 91, 94 (5th Cir. 1992).

erroneous assessment of the evidence.[53] We find no abuse of discretion. Assuming that Mann's out-of-court statements directly incriminated Moore without reference to other admissible evidence, thus implicating Bruton, "*Bruton* has been limited . . . to cases where the admission of the incriminating statements was not within a firmly rooted exception to the hearsay rule."[54] The district court reasoned that Mann's testimony was admissible as an admission of a party under FED. R. EVID. 801(d)(2), or as former testimony under FED. R. EVID. 804(b)(1). We cannot say that the district court erred, legally or factually, in concluding that the testimony was admissible under Rule 804(b)(1).[55] This rule provides a hearsay exception where the declarant is unavailable[56] and the evidence consists of deposition testimony in another proceeding, provided that "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." As a legal matter, we hold that Rule 804(b)(1) is a firmly rooted exception to the hearsay rule.[57] As for the

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[53] *Esmark Apparel, Inc. v. James*, 10 F.3d 1156, 1163 (5th Cir. 1994).

[54] *United States v. Saks*, 964 F.2d 1514, 1525 (5th Cir. 1992).

[55] As the district court recognized, the testimony of Mann was not admissible against Moore as an admission, since an admission, by definition, is a statement offered against a party that is "the party's own statement." FED. R. EVID. 801(d)(2)(A). *See Bruton*, 391 U.S. at 128 n.3.

[56] Mann was "unavailable" because he invoked his Fifth Amendment privilege against self-incrimination.

[57] *See Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972) (noting that at least since *Mattox v. United States*, 156 U.S. 237 (1895), "prior-recorded testimony has been admissible in appropriate cases");

factual predicate of opportunity and motive to develop the prior testimony, the district court reasoned:

> This is . . . testimony given by . . . Mr. Mann in a lawsuit where they are both represented, wherein the FDIC is attempting to recover its losses against the lawyers that represented. We've referred to it as Jones Day, but Mr. Mann, Mr. Moore, Mr. Gallaher, Mr. Christensen, Mr. Alsup were all parties there represented, and the main thrust of that lawsuit was obviously for the FDIC to obtain money from the conduct involving Jefferson Savings, Jefferson Energy, Northwest, Franklin and City Bank.

The court referred to the testimony as "testimony in a proceeding whereby the issues were generally the same." Moore does not show that this factual premise for admission was clearly erroneous. If Moore was a party to the prior suit, and it involved similar claims, we cannot say that the district court erred in ruling the testimony admissible under Rule 804(b)(1). Moore argues that he was not present at the deposition, but as a party to the suit he certainly had an opportunity to attend. He also argues that the deposition was a mere discovery deposition, and he did not necessarily have a motive to cross-examine Mann at that time. Rule 804(b)(1), however, does not require that the party against whom the prior testimony is offered had a compelling tactical or strategic incentive to subject the testimony to cross-examination,

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United States v. Kelly, 892 F.2d 255, 262 (3d Cir. 1989) (holding that Rule 804(b)(1) "former testimony exception is firmly rooted in our jurisprudence"); *United States v. Salim*, 855 F.2d 944, 954-55 (2d Cir. 1988) (same).

only that an opportunity and similar motive to develop the testimony existed.

D. *Joinder and Severance Issues*

Mann and Moore complain that counts 1 and 30, two "disparate" conspiracy counts, should not have been joined in the same indictment. They argue that in this multi-defendant case the two alleged conspiracies were not sufficiently related to constitute a "series" of acts or transactions required for joinder under FED. R. CRIM. P. 8(b). However, appellants failed to move for a severance of counts 1 and 30 prior to trial.[58] Under FED. R. CRIM. P. 12(b), "objections based on defects in the indictment," as well as "[r]equests for severance of charges or defendants under Rule 14," must be raised prior to trial. "Failure by a party to . . . make requests which must be made prior to

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[58] Appellants point out that defendants Gallaher and Christensen filed motions for severance. While Christensen's motion pointed out that the indictment "alleges two distinct conspiracies," neither of these motions was for severance of counts 1 and 30. They were instead motions to sever the movants from the other defendants, and to require separate trials for each of the movants. Even if another defendant had moved to sever counts 1 and 30, appellants do not show that they joined in such motion, or that the district court allowed one defendant to adopt motions filed by other defendants. The district court in fact denied a motion by Gallaher to adopt motions of other defendants, and a motion by Mann to incorporate and adopt Moore's objections to the presentence report. Moore did file a motion "for relief from prejudicial joinder," but the basis of this motion was that count 1 should be dismissed and redrafted because it joined five alleged criminal objectives of the conspiracy, with differing limitations periods. Moore never moved to sever counts 1 and 30.

trial . . . shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver."[59] We have held that where, as here, appellants have failed to show any cause for failing to move for severance prior to trial, we need not even address the merits of their argument.[60] Alternatively, we have limited review to plain error review in such circumstances.[61] Under that exacting standard, appellants have failed to establish a clear or obvious error, which affected their substantial rights, and which would seriously affect the fairness, integrity or public reputation of judicial proceedings if allowed to stand.[62]

Moore argues that the district court should have severed counts 33-39, which pertained solely to Mann. He filed a motion to sever these counts, arguing that they had no relation to the allegations against him and that "combining Mann's alleged criminal conduct with that alleged against Moore would seriously prejudice Moore in the defense of this case." On appeal he argues that inclusion of these counts amounted to misjoinder under Rule 8(b).

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[59] FED. R. CRIM. P. 12(f).

[60] *United States v. Tolliver*, 61 F.3d 1189, 1198-99 (5th Cir. 1995), *vacated and remanded on other grounds*, 516 U.S. 1105 (1996).

[61] *Tolliver* notes that a failure to move for severance prior to trial might leave room for review under the plain error standard of review, *id.* at 1199 n.6, and other cases have reviewed the district court's failure to sever for plain error where there was no objection. *United States v. Misher*, 99 F.3d 664, 669 (5th Cir. 1996); *United States v. Carreon*, 11 F.3d 1225, 1240 (5th Cir. 1994).

[62] *See United States v. Clements*, 73 F.3d 1330, 1337 (5th Cir. 1996).

In reviewing the denial of a motion to sever, "[e]ven if it is determined that initial joinder was improper, in order to demonstrate reversible error, [appellant] must still show clear, specific and compelling prejudice."[63] Moore has failed to make such a showing, for several reasons. First, the evidence against Mann on counts 33-39 represented a relatively small part of the trial. Second, we have no basis for concluding that the jury became prejudiced against Moore as a result of the evidence against Mann on these counts. The court instructed the jury to "[r]emember that you must give separate and independent consideration of the evidence as it applies to each defendant and each count in the indictment. The fact that you may find one defendant guilty or not guilty of any of the offenses charged should not control your verdict as to any other defendant." We have held similar instructions sufficient to cure any possible prejudice from the joinder of defendants.[64] Further, the acquittal of all the defendants on one or more counts[65] "supports the inference that the jury considered separately the evidence as to each defendant and each count."[66] Finally, we note that Moore's own pleadings below suggest that a joint trial with the other defendants offered a benefit to offset the prejudice about which he now complains on appeal.

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[63] *United States v. Bullock*, 71 F.3d 171, 174 (5th Cir. 1995).

[64] See *United States v. Faulkner*, 17 F.3d 745, 759 (5th Cir. 1995), and cases cited therein.

[65] Christensen was acquitted on all fifteen counts against him, Mann was acquitted on count 33, and Moore was acquitted on counts 7, 8, 11, 14, 17, 21, 24, 28 and 29.

[66] *Id.*; *see also United States v. Pettigrew*, 77 F.3d 1500, 1517 (5th Cir. 1996).

When, shortly before trial, the government moved to sever codefendant Gallaher because his counsel had suffered a broken leg, Moore's counsel objected, arguing that the motion for severance, "if granted, will eliminate thirty-three percent (33%) of the assistance that the undersigned had counted upon (i.e., assistance from [counsel for Christensen, Mann and Gallaher]). The undersigned is fearful that a severance of Defendant Gallaher will render the undersigned ineffective due to that decreased assistance, prior to and during the trial."

Mann argues that the court should have severed Mann from the trial after the government read conflicting prior testimony of Mann and Moore. Mann argues that severance was required under *Bruton*, and because Mann's and Moore's defenses were prejudicially antagonistic. As explained above, we find no *Bruton* violation. As for the claim that appellants' defenses became prejudicially antagonistic after the admission of the conflicting prior testimony, the Supreme Court has held that severance is not automatically required when codefendants present mutually antagonistic defenses.[67] Severance in such circumstances is left to the district court's sound discretion.[68] To demonstrate an abuse of discretion in denying a motion to sever, the defendant "bears the burden of showing specific and compelling prejudice that resulted in an unfair trial,"[69] and such prejudice must be

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[67] *Zafiro v. United States*, 506 U.S. 534, 538-39 (1993).

[68] *Id.* at 541.

[69] *United States v. Holloway*, 1 F.3d 307, 311 (5th Cir. 1993).

of a type "against which the trial court was unable to afford protection."[70]

There was no abuse of discretion. The court afforded protection against prejudice by instructing the jury to consider separately the evidence against each defendant, and the jury demonstrated this ability by acquitting all the defendants on one or more counts, as explained above. We have held that where defendants present antagonistic defenses, instructions to consider the evidence as to each defendant separately and individually, and not to consider comments made by counsel as substantive evidence sufficed "to cure any prejudice caused when co-defendants accuse each other of the crime."[71] The trial court gave such instructions. Further, we are not persuaded that Mann and Moore in fact had mutually antagonistic defenses. As to both defendants, the main thrust of the defense was essentially the same – that the defendants had not conspired to defraud the lending institutions or government agencies, that the transactions at the core of the government's case were legitimate business transactions, and that the defendant's conduct and decisions should not be judged with hindsight knowledge of the financial results. The mere fact that Mann and Moore made conflicting statements in their depositions did not render their defenses mutually antagonistic.

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[70] *United States v. Arzola-Amaya*, 867 F.2d 1504, 1516 (5th Cir. 1989).

[71] *United States v. Stouffer*, 986 F.2d 916, 924 (5th Cir. 1993).

E. *Question from Jury*

Moore complains that the district court reversibly erred by failing to answer fully and accurately a question from the jury. After deliberations began, the jury sent a note stating: "Legal Question: Is it true that, in 1982-84, the FHLBB required 'as is' appraisals to back up values of property on their books?" There followed a colloquy among the judge and attorneys. Government counsel was of the view that the correct answer to the question was "yes," but later qualified that answer by opining that appraisals were not required when the savings institution made a "direct investment" in real estate (versus making a loan to a purchaser of the real estate). Counsel for Mann suggested that the jury be advised that there was no requirement of an appraisal for direct investments. Counsel for Moore and Christensen asked that the court answer the question "no." The court was of the view that the FHLBB had the authority to require "as is" appraisals, but "[t]he problem in this case is they never got enough information to intelligently request it." Ultimately, the court instructed the jury: "You must render a verdict based on the evidence presented in trial and the legal instructions previously given you in oral and written form."

Moore objected to this answer, and argues on appeal that the answer was inadequate and that the court should have either answered the question "no" or explained to the jury that "as is" appraisals were not required for direct investments. Moore argues that the only two investments in issue in the 1982-84 time frame referenced in the jury's question were direct investments by Jefferson in the Tartan properties, and Northwest in the

Bridgepoint property. There was extensive testimony at trial regarding appraisals, particularly with respect to the Bridgepoint property, the acquisition of which was the key event alleged in the count 30 conspiracy count. There was some testimony about "as is" versus "as developed" appraisals. Moore points to a post-verdict letter to the court from the jury foreman, who states that he believed the question related to counts 30, 31, and 32, and that jurors were left to "just use their intuition" given the court's answer.[72]

A trial judge enjoys wide latitude in deciding how to respond to a question from the jury.[73] "When evaluating the adequacy of supplemental jury instructions, we ask whether the court's answer was reasonably responsive to the jury's question and whether the original and supplemental instructions as a whole allowed the jury to

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[72] The letter states in pertinent part: "Regarding the deliberations, the convictions on the counts involving 'as-is' appraisals needs to be addressed. I believe these were counts 30, 31, and 32. During the deliberations, I requested an interpretation of the law in the mid-1980's pertaining to appraisals. We needed to know if the law required that federally insured institutions were required to use 'as-is' appraisals when evaluating their assets. The reply stated that the evidence was in the case. Not one juror could find any concrete statement that a future value could not be used, which is why we asked for the interpretation. Many jurors were left to 'just use their intuition.' No expert ever testified, just a variety of opinions were given. It would have been helpful to know if future value appraisals were acceptable in the mid-1980's, as I believe that the convictions on these counts primarily revolved around the lack of interpretation of this law."

[73] *United States v. Stevens*, 38 F.3d 167, 170 (5th Cir. 1994).

understand the issue presented to it."[74] We see no error in the court's answer to the jury's question. The answer properly urged the jurors to refocus on the written charge, rather than to concern themselves with whether federal regulations required "as is" appraisals. The charge clearly instructed the jury that it must find intentionally fraudulent or deceitful acts made the basis of the counts in the indictment before it could convict. It drove this point home by explaining to the jury that (1) a mere violation of a federal regulation is not criminal, absent a finding of the requisite intent to defraud or deceive,[75] (2) the good faith of a defendant is a complete defense to the charges,[76] and (3) a belief honestly held but which turns

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[74] *Id.*

[75] The charge stated: "The issue in this case is whether the defendants are guilty of violating federal criminal statutes specifically alleged in the indictment, not whether the defendant violated a civil law or regulations, regardless of whether such a violation occurred. The testimony which you have heard about the Texas and federal civil statutes and regulations may be considered only because it may be necessary to your understanding of the background of this case, and to your understanding of the reasons or motives for the various transactions."

[76] The charge stated: "The good faith of a defendant is a complete defense to the charges contained in this indictment; good faith on the part of a defendant is simply inconsistent with the intent to defraud or deceive, which is involved in every count. While the term 'good faith' has no precise definition, it means, among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another."

out to be inaccurate, or an honest mistake in judgment, is not criminal.[77]

The letter from the juror does not alter our conclusion. The letter indicates that an answer to the question "would have been helpful." We do not read it to claim that the jury reached the wrong verdict because of the court's answer. Moreover, "[o]utside of the narrow exception that arises when there is evidence of outside influences on a jury, a court should adhere to the common-law rule against admitting juror testimony to impeach a verdict."[78]

F. *Admission of Evidence*

Moore complains that the district court erred in admitting evidence that bad checks were written by Austin Management Associates, a company in which Moore and Gallaher were principals. The government had earlier, unsuccessfully offered the evidence on grounds that it showed motive, in that Moore was "in desperate need of cash" in late 1985 and 1986. When the government later tried to offer the evidence, it argued that the evidence was relevant to the financial condition of GMAC and contemporaneous "loan swapping" with Mann. The

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[77] The charge stated: "A person who acts, or causes another person to act, on a belief or opinion honestly held is not punishable under the criminal law merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an honest error in management does not rise to the level of intent to defraud."

[78] *United States v. Martinez-Moncivais*, 14 F.3d 1030, 1036 (5th Cir. 1994).

government also argued that the "Gallaher Moore companies" were listed on financial disclosure forms provided to First Taylor National Bank, InterFirst Bank and regulators, which were in evidence. The court admitted the testimony, over Moore's objection, "on the grounds that this was on the financial statements as – and that goes to the indictments themselves."

The witness through which this evidence was offered, Plotkin, testified that Austin Management Associates was controlled by Moore, and had run up a negative bank balance of over $147,000 by writing bad checks. Plotkin did not know which individual had written the checks, and explained that after he brought the overdraft situation to Moore's attention, Austin Management Associates received a loan from Franklin Savings, guaranteed by Moore personally, to pay the overdrafts. On cross-examination, Plotkin agreed that Moore was not "aware of the underlying nature and magnitude of the problem" until Plotkin brought it to his attention.

Moore argues that the evidence of the bad checks was irrelevant and inadmissible under FED. R. EVID. 404(b) and 403. The error, if any, in admitting the evidence does not amount to reversible error. An erroneous evidentiary ruling does not warrant reversal unless it affected a substantial right of the complaining party.[79] An error affects a defendant's substantial rights if it " 'had substantial and injurious effect or influence in determining the jury's

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[79] *United States v. Skipper*, 74 F.3d 608, 612 (5th Cir. 1996).

verdict.' "[80] Moore has not met this standard. The testimony concerning the overdrafts comprised only a few minutes of a trial spanning several weeks. Plotkin testified that he could not confirm that Moore personally wrote the bad checks, that Moore was not aware of the nature and magnitude of the overdraft problem until Plotkin brought it to his attention, and that once brought to his attention Moore personally guaranteed a note to resolve the problem. We further note that, to the extent the evidence was relevant to the government's claim that Moore had misrepresented his financial condition in his financial statements, Moore was acquitted on all counts alleging the submission of false personal financial statements.[81]

G. *Denial of Requested Jury Instructions*

Moore complains that the district court reversibly erred in denying his requested jury interrogatories and instructions. "We review jury instructions to determine 'whether the court's charge as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them.' "[82] Unless the defendant has demonstrated that the court's charge as submitted is erroneous,

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[80] *United States v. Lowery*, 135 F.3d 957, 959 (5th Cir. 1998) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

[81] Counts 7, 8, 11, 14, 17, 21, and 24.

[82] *Stouffer*, 986 F.2d at 925 (quoting *United States v. August*, 835 F.2d 76, 77 (5th Cir. 1987)).

his contention that he was entitled to the particular language in his proffered instructions is meritless.[83]

Moore contends that the district court erred in denying his requested instructions and interrogatories on limitations, relating to count 1. Under his proposed jury interrogatories, the jury was to be asked, as to each of the eleven overt acts in furtherance of the conspiracy alleged in count 1 and occurring after August 9, 1984,[84] whether the act occurred and whether it was done in furtherance of any of the five alleged illegal objects of the conspiracy, for a total of 66 questions. The district court did not err in denying this request. The jury was properly instructed that in order to convict on count 1 it must find an overt act committed in furtherance of the conspiracy and within the applicable limitations periods. It was further instructed as to the different limitations periods for the five alleged objects of the conspiracy, and that it should disregard any alleged object for which it did not unanimously find an overt act committed within the applicable limitations period. In short, the jury charge prohibited the jury from convicting on count 1 unless it unanimously found that an overt act was committed in furtherance of at least one of the objects of the conspiracy, and within the applicable limitations period. The charge submitted was legally accurate and adequately presented appellants' limitations defense for jury consideration.

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[83] *United States v. Davis*, 61 F.3d 291, 304-05 (5th Cir. 1995).

[84] As explained above, this is the earliest date on which an overt act in furtherance of the conspiracy could have occurred within the three limitations periods applicable to count 1.

Moore also complains that the court erred in refusing his requested jury instruction on materiality, relating to counts 26 and 27. The court instructed the jury that "[a] statement is materially false if it is shown to be capable of influencing a decision of the institution to which it is made." Moore does not show how the court's definition was erroneous.[85] Further, we will not reverse unless, among other things, the requested instruction concerns an important point such that failure to give it seriously impaired the defendant's ability to effectively present a given defense.[86] Moore does not meet this requirement. The requested instruction, at most, gave a more fact-specific definition of materiality than the one given by the court,[87] and we cannot say that the failure to give the

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[85] The Supreme Court has noted that "a number of federal statutes criminalizing false statements to public officials use the term 'material.' . . . The federal courts have long displayed a quite uniform understanding of the 'materiality' concept as embodied in such statutes. The most common formulation of that understanding is that a concealment or misrepresentation is material if it has a natural tendency to influence, or was capable of influencing, the decision of' the decision-making body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 769-70 (1988) (internal quotation marks and citations omitted) " 'Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' " *Id.* at 770 (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)).

[86] *United States v. Rochester*, 898 F.2d 971, 978 (5th Cir. 1990).

[87] The requested instruction stated: "To be material a statement must have a natural tendency to influence, or be capable of influencing, the decision of the decisionmaking body to which it is addressed. In this regard, to be material, you must find from the evidence beyond a reasonable doubt as to counts

requested instruction impaired Moore's ability to effectively present his defense.

H. *Cross-Appeal on Sentencing*

By cross-appeal the government complains of the sentence imposed. It argues that the district court erred by making a two-point upward adjustment to appellants' base offense level under U.S.S.G. § 3B1.1. The government contends that the district court, having found that appellants were organizers or leaders of a criminal activity involving five or more participants, was required to increase the offense level by four levels. The court imposed only a two-level increase, although the presentence reports recommended a four-level increase under this Guideline.

Guideline 3B1.1(a) calls for a four-level increase if the defendant "was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." Otherwise, Guideline 3B1.1(c) provides for a two-level increase for an organizer or leader. The government claims that at the sentencing hearing the district court found that there were five or more participants, and therefore erred by imposing only a two-level increase.

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26 to 29 that the balance statement contained in the Parkway South Development Corporation tax returns for the tax years ending November 30, 1986 (count 26) [etc.] had a natural tendency to influence or be capable of influencing, the decision of the IRS in the ascertainment, computation, assessment, and collection of income tax allegedly due by Parkway South Development Corporation."

We agree with Mann that the district court did not find as a factual matter at the sentencing hearing that the criminal activity of appellants involved five or more participants.[88] The government argued at the sentencing hearing that Christensen, Gallaher, and Alsup were criminally involved. The court did state, in the course of its colloquy with the attorneys regarding appellants' leadership role, that "Mr. Christensen and Mr. Alsup knew what was going on. . . . But the three of them knew what was going on. . . . Mr. Brennan obviously knew. Mr. White obviously knew. Why they weren't charged – I guess the prosecution will carry that responsibility one way or the other. But there were five people." While the court found that persons in addition to appellants "knew what was going on," this is not a finding that there were five or more participants under the Guideline. Note 1 to the Guideline provides that "[a] participant is a person who is criminally responsible for the commission of the offense, but need not have been convicted." A finding that other persons "knew what was going on" is not a finding that these persons were criminally responsible for commission of an offense. "Willful participation is an essential element of the crime of conspiracy; mere knowledge of a conspiracy does not itself make a person a conspirator."[89]

Further, as we understand the government's argument, it does not maintain that a finding of fewer than

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[88] We pretermit appellants' arguments that the government failed to preserve error or timely perfect its cross-appeal.

[89] *United States v. D'Angelo*, 598 F.2d 1002, 1003 (5th Cir. 1979).

five participants would have been clearly erroneous.[90] The government argues only that the district court did find five or more participants, and having made such a finding, it had no discretion to impose less than a four-level increase. As explained above, we agree with appellants that the district court did not make such a finding.[91]

AFFIRMED

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[90] The government states in its opening brief that it "is not challenging any factual finding of the district court as to the aggravating role designation or the number of participants."

[91] In their briefs responding to the cross-appeal, appellants argue for the first time that the district court erred in ordering restitution. As these arguments were raised neither in the district court nor appellants' opening briefs, our review is at most one for plain error. *See United States v. Green*, 46 F.3d 461, 465 n.3 (5th Cir. 1995) (issue raised for the first time in reply brief is waived). We find no plain error. The basis for appellants' challenges to the restitution ordered in the judgments is that restitution is only permitted under 18 U.S.C. § 3663, which does not cover tax offenses under Title 26. However, our reading of the sentencing hearing is that the restitution orders were based on losses calculated (and restitution recommended thereon) in the presentence reports. The losses calculated in the presentence reports were not losses associated with the tax counts. Moore argues that the order of $460,000 in restitution by him to the IRS is an order of restitution as to count 27. Assuming Moore is correct, the filing of the false tax return for PSDC alleged in count 27 was also alleged as an overt act in furtherance of the count 1 conspiracy. Count 1 is a count under Title 18, subject to restitution under § 3663.

APPENDIX B

UNITED STATES OF AMERICA, Plaintiff – Appellee-Cross-Appellant v. JAMES SCOTT MANN; WILLIAM M MOORE, Defendants – Appellants-Cross-Appellees

No. 96-50609

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

January 12, 1999, Filed

PER CURIAM:

The Petitions for Rehearing on behalf of James S. Mann and William M. Moore are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc on behalf of William M. Moore is also DENIED.

ENTERED FOR THE COURT:

Thomas M. Reavley
United States Circuit Judge

OPINION: ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC